PROPOSALS FOR A CONSTITUTIONAL AMENDMENT TO PROVIDE RIGHTS FOR VICTIMS OF CRIME

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.J. Res. 173 and H.J. Res. 174

PROPOSALS FOR A CONSTITUTIONAL AMENDMENT TO PROVIDE RIGHTS FOR VICTIMS OF CRIME

JULY 11, 1996

Serial No. 91

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

35-331 CC WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053788-6

104

PROPOSALS FOR A CONSTITUTIONAL AMENDMENT TO PROVIDE RIGHTS FOR VICTIMS OF CRIME

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.J. Res. 173 and H.J. Res. 174

PROPOSALS FOR A CONSTITUTIONAL AMENDMENT TO PROVIDE RIGHTS FOR VICTIMS OF CRIME

JULY 11, 1996

Serial No. 91

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

35-331 CC WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053788-6

COMMITTEE ON THE JUDICIARY

HENRY J. HYDE, Illinois, *Chairman*

CARLOS J. MOORHEAD, California
F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
STEVEN SCHIFF, New Mexico
ELTON GALLEGLY, California
CHARLES T. CANADY, Florida
BOB INGLIS, South Carolina
BOB GOODLATTE, Virginia
STEPHEN E. BUYER, Indiana
MARTIN R. HOKE, Ohio
SONNY BONO, California
FRED HEINEMAN, North Carolina
ED BRYANT, Tennessee
STEVE CHABOT, Ohio
MICHAEL PATRICK FLANAGAN, Illinois
BOB BARR, Georgia

JOHN CONYERS, JR., Michigan
PATRICIA SCHROEDER, Colorado
BARNEY FRANK, Massachusetts
CHARLES E. SCHUMER, New York
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JOHN BRYANT, Texas
JACK REED, Rhode Island
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
XAVIER BECERRA, California
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California

ALAN F. COFFEY, JR., *General Counsel/Staff Director*
JULIAN EPSTEIN, *Minority Staff Director*

CONTENTS

HEARING DATE

TEXTS OF BILLS

OPENING STATEMENT

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

PROPOSALS FOR A CONSTITUTIONAL AMENDMENT TO PROVIDE RIGHTS FOR VICTIMS OF CRIME

THURSDAY, JULY 11, 1996

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice at 9:40 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, Carlos J. Moorhead, F. James Sensenbrenner, Jr., George W. Gekas, Howard Coble, Charles T. Canady, Bob Goodlatte, Stephen E. Buyer, Sonny Bono, Fred Heineman, Ed Bryant of Tennessee, Michael Patrick Flanagan, John Conyers, Jr., Charles E. Schumer, Howard L. Berman, Jack Reed, Robert C. Scott, Melvin L. Watt, Xavier Becerra, Zoe Lofgren, Sheila Jackson Lee, and Maxine Waters.

Also present: Joseph Gibson, counsel; Kenny Prater, clerk; Perry Apelbaum, minority chief counsel; and Stephanie Peters, minority counsel.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. Ladies and gentlemen, the committee will come to order. This morning the committee considers proposals for a constitutional amendment to provide rights for victims of crimes. As everyone who reads a newspaper knows, violent criminals damage and destroy the lives of innocent victims every day. When law enforcement officials arrest and prosecute people accused of committing violent crimes, those individuals have a wide array of legal rights, many of which are constitutionally guaranteed. Those rights protect accused persons against unjust convictions and allow them to present their side of the story. That is as it should be, and we are certainly not here to change that.

All too often, however, the criminal justice system overlooks the legitimate concerns of crime victims. Victims often sit through criminal trials where the defendant has the protections of the 4th, 5th, 6th, 8th, and 14th amendments, and the courts rightfully protect these constitutional rights.

On the other hand, the victim who has suffered grievously has no Federal constitutional rights at all. Crime victims deserve constitutional protections just as accused persons have constitutional protections. For that reason, I believe the time has come to provide specific defined rights under the Constitution to crime victims.

Although some victims in high profile cases are treated with the dignity they deserve, I think the rights provided in this proposed amendment may be even more important in the hundreds of criminal cases we never hear about. This amendment applies to many kinds of crimes and the victims of all of those crimes deserve protection.

Today I want to focus on one group of victims that I am especially interested in, the thousands of women and children who are victims of domestic violence every day. For far too long, we as a society have stood silently by while domestic abusers have beaten, tortured, maimed and murdered innocent women and children. The violent actions of these predators are morally repugnant. Silence has protected them, but this amendment will empower their victims.

Specially, this amendment will empower these victims by giving them knowledge of when they may confront their attackers in court, by giving them the opportunity to speak in court about the resolution of the case, by giving them Government protection from physical harm and intimidation, and by giving them restitution from their attackers. At last, this amendment will give the victims of domestic abuse the power they need to call their abusers to account publicly for their crimes.

We have worked very hard in this Congress to uphold family values in many areas, and I believe this is another area in which we can continue to work together to further those values. Senator Dole endorsed this proposal in a speech in Colorado on May 28, and he became a cosponsor of S.J. Res. 52 on June 5. Later, President Clinton added his bipartisan support. I also want to thank Senator Kyl and Senator Feinstein, the cosponsors of this amendment in the Senate, as well as Congressman Royce, a long-time champion of victims' rights for their bipartisan support. I look forward to working with all of the interested parties to advance this amendment further.

[The bills, H.J. Res. 173 and H.J. Res. 174, follow:]

104TH CONGRESS
2D SESSION

H. J. RES. 173

Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

IN THE HOUSE OF REPRESENTATIVES

APRIL 22, 1996

Mr. HYDE introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. To insure that victims of crime are treated with fairness, dignity, and respect, in each prosecution by the United States or a State, for a crime either involving violence or for which the defendant can be imprisoned for a period longer than one year, any victim of the crime shall have the right to receive notice of, and to be present at, every stage of the public proceedings, unless the court determines there is good cause for the victim not to be present; to comment at any such proceeding involving the possible release of the defendant from custody, the acceptance of any plea agreement with the defendant, or the sentencing of the defendant; to be informed of any release or escape of the defendant; to receive reasonable protection from physical harm or intimidation relating to the proceedings; to have the proceedings resolved in a prompt and timely manner; and to have the court order restitution from the defendant upon conviction.

"SECTION 2. The rights established in section 1 shall be made available to victims upon request to the prosecuting authority and in the manner provided by law under section 3.

"SECTION 3. The legislatures of the States, with respect to a proceeding in a State forum, and the Congress

with respect to a proceeding in a United States forum, shall have the power to enforce this article by appropriate legislation.".

○

IA

104TH CONGRESS
2D SESSION

H. J. RES. 174

Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

IN THE HOUSE OF REPRESENTATIVES

APRIL 22, 1996

Mr. HYDE introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. To ensure that the victim is treated with fairness, dignity, and respect, from the occurrence of a crime of violence and other crimes as may be defined by law pursuant to section 2 of this article, and throughout the criminal, military, and juvenile justice processes, as a matter of fundamental rights to liberty, justice, and due process, the victim shall have the following rights: to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender; to be heard at any proceeding involving sentencing, including the right to object to a previously negotiated plea, or a release from custody; to be informed of any release or escape; and to a speedy trial, a final conclusion free from unreasonable delay, full restitution from the convicted offender, reasonable measures to protect the victim from violence or intimidation by the accused or convicted offender, and notice of the victim's rights.

"SECTION 2. The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to implement further this article by appropriate legislation.".

○

Mr. HYDE. Because of the large number of witnesses we have today, other members who may have statements I request that they put them in the record or give them during their question time. Our congressional panel, Senators Kyl and Senator Feinstein and Congressman Royce have other commitments, so I do request that members refrain from questioning the congressional panel.

Finally, I want to announce that Associate Attorney General Schmidt from the Justice Department is out of town this morning, could not be back until this afternoon. For that reason, we will hear the testimony of the first three panels. When that is completed, we will adjourn until 3 p.m., at which time we will reconvene to hear from Mr. Schmidt.

I am now pleased to recognize Senator Kyl.

STATEMENT OF HON. JON KYL, A SENATOR IN CONGRESS FROM THE STATE OF ARIZONA

Mr. KYL. Thank you, Mr. Chairman. Thank you very much for holding this hearing. I also want to thank you for testifying before the Senate Judiciary Committee in April with respect to this same matter. I can say I think that there is almost nothing that this Congress could do that would be more important before we finish our session than adopting a constitutional amendment to protect crime victims' rights. So I very much appreciate your moving this process forward in the House of Representatives.

Mr. Chairman, the scales of justice are imbalanced. There are at least eight specifically enumerated rights protecting rights of the accused in our Federal Constitution. There are none specifying protections for victims. This imbalance has created a situation which needs to be rectified. Let me site just one case to illustrate.

In my own State of Arizona, Patricia Pollard was brutally attacked, left by the side of the road to die. Her attacker was found, was convicted. But 10 years short of fulfilling his minimum sentence, he was paroled. His victim, Patricia Pollard, was given no notice. Obviously, if there had been notice to her and an opportunity to be heard, she would have warned the parole officials and the judge about his danger to others and to her.

But because he was a bad actor, not long after he was paroled, he was back under arrest again, this time for narcotics violations. But again, he was to be released. The parole board had considered a release again, prior to the time he served his minimum sentence, and again without notice to her. This time, however, the Arizona Constitution had provided, in the interim, an opportunity for victims to be heard at such proceedings. Someone found out about it, even though no notice was given to Patricia Pollard. She was ultimately given the opportunity to persuade the parole board not to parole her assailant. As a result, he remained in jail.

I asked her about this. I said, "Did you fear for your life?" She said, "More importantly, I feared what he would do to others. I would not have been able to live with myself if I had not gone down to the parole board and told them what he did to me and what he might do to others." As a result of that, he stayed in jail.

Mr. Chairman, we in this country have a long history of protecting the innocent. In fact, we're willing to err to far on the side of protecting the innocent, we say we're willing to let nine guilty peo-

ple go free so that one innocent person is not convicted. Yet we do not protect the most innocent in society, those who we have not been able to protect who have been victimized, and who then find themselves victimized a second time in our criminal justice system.

Now our constitutional amendment provides the protections that you identified in your opening statement. One of the first questions is, why can't this be done by State statute or constitution? I have two responses to that. The first is simply logical. Would we today say that it is perfectly adequate to provide for the protections of free speech, free press, peaceable assembly, or specific rights for victims, to a lawyer, to a public trial, to due process, would we be satisfied to merely put those in statute today? I don't think any of us here would be willing to do that, because we know they are fundamental rights.

Well the same thing is true about the rights of victims. If we believe they are fundamental, then there is only one place to put them. That is in the same document at the same level that we have placed these rights of defendants.

The second answer to the question is specific case law. We have some history fortunately, of dealing with the 20 States that have either statutes or constitutional provisions protecting rights of victims. In every case where there is a conflict between the right of the defendant, which is embodied in the supreme law of the land, the Federal Constitution, and these protections for victims, naturally the Federal Constitution wins. The victims rights are trumped.

I will submit for the record a variety of cases. One of them is *Romley* v. *Superior Court* in my own State of Arizona, where the court specifically held that the defendant's constitutional right to due process conflicts with the victims bill of rights, that due process is a superior right. Being a part of the U.S. Constitution, it prevails over any provision in a State constitution.

The same thing was found in *Johnson* v. *Texas Department of Criminal Justice.* A district court decision of 1995 in the State of Texas. There are other decisions from Florida, from Colorado, from New Jersey, and other States.

Mr. Chairman, the bottom line is that providing these protections only in statute or State constitution does not provide equal and adequate protection for the rights of victims. Therefore, the following rights should be placed in the U.S. Constitution, the right to be informed of proceedings, to be heard, for a victim to be notified of the offender's release or escape, to have a final disposition free from unreasonable delay, to have the right of full restitution, the right to reasonable conditions of confinement or release to protect the victim from violence or intimidation, and the right of victims to be notified of their rights so that they can properly be exercised.

Again, Mr. Chairman, I very much appreciate your holding this hearing, and would just conclude with one final sentence. The chairman introduced two different versions here in the House. Senator Feinstein and I introduced one version in the Senate. Since then, you and we and the Justice Department on behalf of the President, have been working to try to refine the language so that the version we finally bring to both bodies will be a consensus version. We are very far along on that path. We don't see any show

stoppers. There are minor language changes we are still working on. But we believe that by continuing to refine the language, by the time both you and the House and we in the Senate are ready to proceed, we will have a consensus constitutional proposal that all of us can agree upon.

[The prepared statement of Mr. Kyl follows:]

PREPARED STATEMENT OF HON. JON KYL, A SENATOR IN CONGRESS FROM THE STATE OF ARIZONA

INTRODUCTION

At the outset, I would like to thank the distinguished chairman of the House Judiciary Committee, Henry Hyde, for holding this hearing on the Victims' Bill of Rights. In April, Chairman Hyde provided very useful testimony on the amendment before the Senate Judiciary Committee. I would also like to thank Senator Dianne Feinstein for her leadership in cosponsoring and championing the amendment. The amendment is picking up momentum in large part because of her efforts to advance the cause of victims' rights.

Much has happened in our efforts to pass the Victims' Bill of Rights since the Senate held hearings. President Clinton and Bob Dole have both endorsed a victims' rights amendment. Although we don't have many legislative days left in this session of Congress, the support of the President and Mr. Dole puts the amendment on the fast track, and improves the chances of a strong bi-partisan vote on it in this legislative session.

Patricia Pollard

Permit me to recite just one example of why I believe a constitutional right to protect crime victims is so important.

Consider the case of Patricia Pollard—a woman from my home state of Arizona.

In July of 1974, on a road just outside of Flagstaff, Arizona, Patricia Pollard was silenced—first by an attacker, and then by the judicial system. Eric Mageary used the jagged edge of a ripped beer can to inflict deep slash wounds in her body. He broke her ribs and her jaw. He choked her into unconsciousness and left her for dead by the side of the road.

Patricia survived. Mageary was convicted and sent to prison Ten years short of serving his minimum sentence, he was paroled. No notice was given to Patricia. If given the opportunity, Patricia would have wanted to tell the judge about the crime, about how dangerous Mageary was, and how a long prison sentence was needed to protect the community from this vicious criminal. But the law gave Patricia no right to be heard, and society paid for its silencing of her. Mageary's parole was soon revoked for serious narcotics violations, and he was back in prison.

In 1990, the people of Arizona amended their state constitution to add a Victims' Bill of Rights, which established the right of victims to be informed, present, and heard at every critical stage in their case.

Incredibly, in 1993, in direct violation of Patricia's new constitutional rights, the parole board voted to release Mageary—again without hearing from Patricia.

But this time there was a remedy for this injustice. An action was filed to stop the release and force the board to hold another hearing in which Patricia's rights would be protected. The Arizona Court of Appeals acted swiftly and stopped the release. The second time around, after the board took the time to hear directly about the horrible nature of the crime, they voted for public safety and for Patricia, and kept Mageary behind bars. Without constitutional rights for Patricia, the safety of the community would have been jeopardized again.

Constitutional rights restored Patricia's voice. Not all Americans have these rights, and even those that exist are not protected by the supreme law of the land, the U. S. Constitution. That is why we have introduced a Victims' Bill of Rights to the U. S. Constitution to extend to victims throughout the country a threshold of basic fairness. Victims must be given a voice -not a veto, but a real opportunity to stand and speak for justice and the law-abiding in our communities.

Need to protect victims' rights—scales of justice imbalanced

The strong bipartisan support for the amendment makes clear that the Victims' Bill of Rights is not a partisan issue, or some election-year gimmick. The idea stems from a 1982 President's Task Force on Victims of Crime, which concluded that "the criminal justice system has lost its essential balance," and that constitutional protection of victims' rights was the only way to guarantee fair treatment of crime vic-

tims. Since then, grass-roots citizens' organizations around the country have pushed for amendments to their state constitutions. Twenty states have responded to the rude treatment victims face, and have enacted constitutional amendments. Seven more states are expected to adopt victims' rights amendments in the coming election.

But this patchwork of state constitutional amendments is inadequate. Even in the 20 states that have victims' rights constitutional amendments, the rights of victims are routinely overridden by the rights of defendants, which are enshrined in the Bill of Rights of the United States Constitution, the highest law of the land. There is no dispute that the federal constitution trumps state law in cases of conflict.

The 43 million victims of serious crimes each year, need a constitutional amendment to protect their rights, and restore balance to our justice system. Those accused of crime have many constitutionally protected rights: They have the right to due process, right to confront witnesses; right against self-incrimination, right to a jury trial; right to a speedy trial; right to a public trial; right to counsel; right to be free from unreasonable searches and seizures.

Yet, despite rights for the accused, the United States Constitution, our highest law, has no protection for *crime victims*. The recognized symbol of justice is a figure holding a balanced set of scales, but in reality the scales are heavily weighed on the side of the accused. These protections are sadly one-sided. Our proposal will not deny or infringe any constitutional right of any person accused or convicted of a crime. But it will add to the body of rights we all enjoy as Americans.

Victims of crimes have no constitutional rights. They are often treated as mere inconveniences, forced to view the process from the sidelines. Defendants can be present through their entire trial because they have a constitutional right to be there. But in many trials, victims are ordered to leave the courtroom, such as recently was the case with some of the victims of the Oklahoma City bombing.

Victims often are not informed of critical proceedings, such as hearings to consider releasing a defendant on bail or allowing him to plea bargain to a reduced charge. Even when victims find out about these proceedings, they frequently have no opportunity to speak. Today victims have no right to reasonable finality. It is not uncommon for cases to last years and years after the jury verdict, while courts again and again review the same issue. These lengthy delays cause terrible suffering for crime victims, especially the loved ones of homicide victims. What others consider as a mere inconvenience can be an endless nightmare for the victim.

Amending the Constitution is a big step, but a necessary one

Amending the Constitution is, of course, a big step—one which I do not take lightly—but, on this issue, it is a necessary one. As Thomas Jefferson once said: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times."

Who would be comfortable now if the right to free speech, or a free press, or to peaceably assemble, or any of our other rights were subject to the whims of changing legislative or court majorities? When the rights to vote were extended to all regardless of race, and to women, were they simply put into a statute? Who would dare stand before a crowd of people anywhere in our country and say that a defendant's rights to a lawyer, a speedy public trial, due process, to be informed of the charges, to confront witnesses, to remain silent, or any of the other constitutional protections are important, but don't need to be in the Constitution?

Such a position would be rightly subject to ridicule. Yet that is precisely what critics of the Victims' Bill of Rights would tell crime victims. Victims of crime will never be treated fairly by a system that permits the defendant's constitutional rights always to trump the protections given to victims. Such a system forever would make victims second-class citizens It is precisely because the Constitution is hard to change that basic rights for victims need to be protected in it.

CONCLUSION

The American people are becoming more and more aware of the imbalance in our system. They realize that as we continue to fight for rights for victims of crime, in courtrooms across America, victims will be forced to sit outside while their attackers are tried. Today, and every day, critical proceedings will be held in criminal cases and victims will not be informed of those proceedings or given the opportunity for their voices to be heard. Today, and every day, victims will be forced to endure endless delays. With this constitutional amendment we can cure this injustice.

I would note that the incredible grassroots support for the Victims' Bill of Rights: Karen and Monte Colvin of Tucson, Arizona, whose 19-year-old son Mike was killed in 1990, drove their three-wheel Harley Davidson across the country to Washington, D.C., where they presented me with a 2,000-signature petition in support of the amendment. The Victims' Bill of Rights is endorsed by: Mothers Against Drunk Driving (MADD); Parents of Murdered Children; National Organization for Victim Assistance; National Victim Center; National Victims' Constitutional Amendment Network; National Center for Missing & Exploited Children; Victim Assistance Legal Organization; Doris Tate Crime Victims Bureau; Citizens for Law and Order; John Walsh, host of "America's Most Wanted"; National Coalition Against Sexual Assault; The Law Enforcement Alliance of America.

In closing, I would again like to thank Chairman Henry Hyde for holding this hearing, and Senator Feinstein for her hard work on this amendment. For far too long, the criminal justice system has ignored crime victims who deserve to be treated with fairness, dignity, and respect. Our criminal justice system will never be truly just as long as criminals have rights and victims have none. We need a new definition of justice—one that includes the victim.

Mr. HYDE. Well, I thank you, Senator. I certainly concur in your optimistic assessment that we can do this. We are all working along with you and Senator Feinstein and the Justice Department to that end.

I gave you a very inadequate introduction, but you are someone who needs no introduction, a former Member of the House and a distinguished Senator from Arizona, and a stalwart champion of victims' rights for many years.

I am very pleased now to introduce Senator Dianne Feinstein from the State of California. She has lent her important bipartisan support to Senator Kyl's legislation in the Senate. We certainly appreciate her being here today. We appreciate her support for this important amendment and her input.

Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A SENATOR IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. FEINSTEIN. Thank you very much, Mr. Chairman. I want to thank you for leading this effort in the House. I want to just comment that Senator Kyl has really been very wonderful to work with. We have worked together in the spirit of bipartisanship. I think that's one of the reasons why we are going to end up with a constitutional amendment that will meet the tests of both political parties. We were both very appreciative when former majority leader Bob Dole supported this, and of course the President of the United States has joined in his support. Since that time, the White House and the Justice Department have played very important roles as Senator Kyl has said.

We have a draft of our latest up until last night. I think all—we have worked with Justice, with the White House, with Prof. Larry Tribe, with Stephen Twist—Dr. Stephen Twist representing the victims. I think we've got concurrence with all but perhaps one part that Justice still has some concerns about. I'd be happy to share that with you. You might want to discuss that with Justice when they come in this afternoon.

Let me tell you how I got into this. There was a case in San Francisco in 1974. The case was Frank Carlson and Annette Carlson. They lived in Portrero Hill. A man by the name of Angelo Pavegeau broke into their home, tied up Frank Carlson. They were a young couple. Beat him to death with a hammer, a chopping

block and a ceramic vase. He then proceeded to rape Annette Carlson. He broke several of her bones. He slit her wrists. He tried to strangle her with a telephone cord. He then set their home on fire and he left them.

Believe it or not, somehow, some way she lived. She testified against him. When I was mayor, she called me every year. She said, "I know he's going to get out. I live in fear. I have changed my name. I live anonymously. Please help me keep him in prison." Then I began to think.

Then there was another case called the Salarno case, Harriet and Mike Salarno. They own a television store in the Sunset District in San Francisco. Their daughter Catina was murdered at the University of the Pacific by her boyfriend, who then went in and watched television while she bled to death in front of the dormitory. They began to head a victims movement.

In 1982, California became the first of 20 States to pass constitutional amendments which I supported, to protect victims' rights. The problem with that is that they are patchwork of different rights throughout the States. As Senator Kyl said, and you can see here, an accused have 15 specific rights guaranteed to them by our Constitution. Victims have none. So when the rights come up against each other, as they are now beginning to do in a couple of cases, in Oklahoma City, for example. The California case I described was one, but the problem now has become nationwide.

The prosecution is underway now against two men charged with the bombing. Their surviving victims, including families of the deceased, wanted to attend the trial. Unfortunately, the judge has forced them to make a very painful choice. If they choose to attend the trial, they will forfeit their right to testify at the sentencing hearing if the defendants are convicted. Despite the prosecutor's efforts, the judge decided that victims' testimony at sentencing could be affected "by just seeing the defendants in court." So attendance at the trial will disqualify them from testifying. The judge apparently had no concerns about the testimony of the defendants being affected by their presence or even their families' presence during the trial.

This followed on the heels of an earlier ruling by the judge, that victims should not get priority for seats in the courtroom, because he had constitutional concerns about giving them special treatment.

Mr. Chairman, our amendment will prevent just this kind of thing from happening in the future. I go on then and discuss in my written remarks, a Utah rape case that's recent with some of the same conflicts presented to the judiciary. I really believe this is an idea whose time has come. I don't believe when our forefathers drafted the Constitution and the Bill of Rights, that they knew there would be 11 million victims of crimes of violence in these United States every year, and 42 million victims overall.

People have a right to know when the trial is happening, to have notice. They have a right to be present. The victim has a right, we hope, to be heard. More fundamentally, a victim has a right to be noticed if their assailant escapes. They have a right to protection in that situation. They have a right to know and to be heard at a parole hearing. Those are the rights that would be established by

this constitutional amendment. So I am hopeful, very hopeful, that with the President's support, with the strong bipartisan support, that we can move this this year, get it before the States, and have it ratified by three-quarters of our States within a three-year period. I thank you very much, Mr. Chairman.

[The prepared statement of Mrs. Feinstein follows:]

PREPARED STATEMENT OF HON. DIANNE FEINSTEIN, A SENATOR IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman. I am very pleased that you are holding this hearing on an issue that is very, very important to me, and, I know, to you as well-providing constitutional rights for victims of crime. I also want to acknowledge the leadership of my colleague, Senator Kyl, in bringing this important issue to the forefront.

Let me start by telling you about two cases in California which really brought home to me the need for greater protection for the rights of victims of crime.

PAVAGEAU CASE

In 1974, in San Francisco, a man named Angelo Pavageau broke into the house of Frank Carlson in Portrero Hill. He tied Mr. Carlson to a chair and murdered him by beating him with a hammer, a chopping block, and a ceramic vase. He then repeatedly raped Carlson's 24-year-old wife, breaking several of her bones. He slit her wrist and tried to strangle her with a telephone cord before setting their home on fire and leaving them to go up in flames.

But Mrs. Carlson survived the fire. She lived to testify against her attacker. But she has had to change her name and lives in fear that her attacker may be released someday. When I was Mayor of San Francisco, she called me several times to notify me that he was up for parole. But it was up to her to find out when his parole hearings were.

It shouldn't have to be that way. It should be the responsibility of the state to send a letter through the mail or make a phone call to let a victim know that her attacker is up for parole, and she should have the opportunity to testify at that hearing.

SALARNO CASE

In 1979 a killing occurred which really galvanized the victims' rights movement in California. A young woman named Catina Rose Salarno was murdered on her first day of school at the University of Pacific in Stockton. The killer was 18-year-old Steven John Burns, Catina's high school sweetheart and a trusted family friend.

Catina had broken off her relationship with Burns, but she agreed to meet him that night for a walk on campus. When Catina turned around, he shot her at point-blank range, left her there on the ground, and went back to his dorm room to watch Monday night football. He could see her as she bled to death outside his window.

Burns argued at the trial that he suffered from schizophrenia, but he was convicted and sentenced to life at the California Medical Facility in Vacaville. During the trial, the family was not allowed in the courtroom and had to sit outside waiting for news. Burns was up for parole in October of last year, but was denied because of the gravity of the crime and his lack of remorse. He can apply for parole again in 1998.

The murder of Catina has had a profound and lasting effect on the family. Her mother, Harriet, and her father, Michael, co-founded Crime Victims United—one of California's most outspoken groups for victims rights. A year ago, her younger sister, Nina, became a deputy district attorney in Sacramento County. Together, the family works tirelessly to educate the public about the rights of crime victims.

These cases helped California to become the first state in the nation to pass a crime victims' amendment–Proposition 8—to its constitution in 1982. It gave victims the right to restitution, the right to testify at sentencing, probation and parole hearings, established a right to safe and secure public school campuses, and made various changes in criminal law. It was a good start.

Since that time, 20 states have passed constitutional amendments guaranteeing the rights of crime victims—and five more are expected to pass by the end of this year. Most of the state amendments have won with the approval of more than 80 percent of the voters.

But today, in most states of the Union, victims still are not made aware of the victim's trial, many times are not allowed in the courtroom during the trial, and are not notified when a convicted offender is released from prison.

OKLAHOMA BOMBING CASE

While the California cases I described brought victims' mistreatment by the legal system home to me, the problem is nationwide, and is as current as today's news. Two developments in just the past two weeks demonstrate the real need for a federal constitutional amendment, right now.

The prosecution is under way against two men charged with one of the most cowardly, evil and heinous acts in recent memory: the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, which killed 168 people.

The surviving victims, including families of the deceased, wanted to attend the trial in this case. Unfortunately, the judge has forced them to make a very painful choice: if they choose to attend the trial, they will forfeit their right to testify at the sentencing hearing if the defendants are convicted.

Despite the prosecutor's valiant efforts, the judge decided that victims' testimony at sentencing could be affected, quote, "by just seeing the defendants in court," unquote, so attendance at the trial will disqualify them from testifying. The judge apparently had no such concerns about the testimony of the defendants being affected by their presence during the trial.

This followed on the heels of an earlier ruling by the judge that victims should not get priority for seats in the courtroom because he had constitutional concerns about giving them special treatment.

Mr. Chairman, our amendment will prevent just this sort of miscarriage of justice. If our amendment were law today, those victims would be allowed to attend the trial and to testify at sentencing, and would not be shut out of one or the other proceeding.

UTAH RAPE CASE

Just last Friday, another judicial decision demonstrated why state constitutional amendments are not sufficient to solve these problems. In the case of *Utah* v. *Beltran-Felix*, the defendant's partner raped a jewelry store employee during an armed robbery, and then the defendant Emilio Beltran-Felix, forced this woman to perform oral sex on him. All of this happened in front of her co-workers.

Because Utah has a victims' rights amendment, the victim asserted her right to attend the trial. However, defense counsel objected, claiming that this violated the Fifth Amendment of the United States Constitution.

Fortunately, the judge allowed the victim to remain, and last Friday this decision was upheld by the Utah Court of Appeals. However, that court refused to categorically assert that the presence of a non-disruptive victim did not violate the Fifth Amendment. Instead, the court took the approach of looking at the particular facts of the case to see whether the victim tailored her testimony to match the testimony of other witnesses.

This case-by-case approach to determining whether victims can constitutionally be allowed to attend the trial, like the decision in the Oklahoma bombing case, puts victims in an unfairly difficult position. In Utah now, before deciding to attend the trial, the victim must consider that she is taking the risk that she is giving her attacker an argument that she tailored her testimony, which he can then use on appeal to possibly overturn his conviction.

Our amendment would place victims on the same footing as criminals. Sequestration of witnesses is not required for the *defendant*, despite the same or even greater potential for tailoring testimony, because his right to be in the courtroom is deemed more important.

Victims' right to be in the courtroom is equally important—yes, the defendant's liberty is at risk, but it is the victim who often has been traumatized and brutalized, and for whom we seek justice in the trial. This constitutional amendment will give the victim the same right to attend the trial that is as much theirs as it is the defendant's.

Mr. Chairman, I believe these cases demonstrate that the time finally has come to amend the United States Constitution to protect the rights of victims of serious crimes.

WHY A CONSTITUTIONAL AMENDMENT?

Some people question why this needs to be a constitutional amendment. The reasons for this are: to give victims' rights the same legal strength that criminals' rights have; to give these rights to victims of crime in every state of the Union; and to establish consistent, uniform rights for the millions of crime victims in our country.

Our founding fathers, when they included the rights of the accused in the Constitution, did not think to include the rights of crime victims. Then again, in 1776, there weren't 43 million victims of crime every year.

Our Constitution spells out numerous rights of the accused in our society, all of which were established by amendment to the Constitution: the right to a grand jury indictment for capital or infamous crimes; the prohibition against double jeopardy; the right against self-incrimination; the right to due process; the right to a speedy trial and the right to an impartial jury of ones' peers; the right to be informed of the nature and cause of the criminal accusation; the right to confront witnesses; the right to counsel; and the right to subpoena witnesses—and so on.

But the *victims* of a crime have no such rights. In fact, the U.S. Constitution guarantees them no rights at *all*. This Constitutional Amendment, as I see it, is an attempt to level the playing field for crime victims. It says to the *victims: You* have the fundamental right to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the attacker; *You* have the right to be heard at any proceeding involving a release from custody or sentencing; *You* have the right to be informed of any release or escape; *You* have a right to an order full restitution from the convicted offender; *You* have the right to reasonable measures of protection from violence or intimidation by the accused or convicted offender; and *You* have the right to be made aware of all of your rights as a victim.

Unless these rights are given the same constitutional status that criminals' rights have, the rights of a criminal will always trump the rights of a victim, as the Oklahoma City case amply demonstrates.

Support for a victims' rights constitutional amendment has continued to grow since Senator Kyl and I joined with you, Mr. Chairman, in announcing our amendment in April. Our amendment has been endorsed by: National Center for Missing and Exploited Children; the Honorable Bob Miller, Governor of Nevada, Vice–Chairman, National Governors' Association; Mothers Against Drunk Driving (MADD); Los Angeles County Sheriff Sherman Block; Victim Assistance Legal Organization; Citizens for Law and Order; Parents of Murdered Children; National Organization for Victim Assistance; National Coalition Against Sexual Assault; National Victim Center; Alaska State Legislature; Doris Tate Victims Bureau; Law Enforcement Alliance of America; and National Victims' Constitutional Amendment Network.

And two weeks ago, the movement for a constitutional amendment was given renewed momentum when President Clinton announced his support for a victims' rights amendment. His opponent, Senator Dole, has also endorsed an amendment.

Some legitimate concerns about our amendment have been raised. For example, I myself was concerned that prosecutors and other government officials not be subject to costly lawsuits for monetary damages for, for example, the failure to give a victim notice of a particular proceeding. Before I agreed to co-sponsor this amendment, Senator Kyl and I agreed that we would address this issue.

To address some of the legitimate concerns which have been raised, and to more finely tune the amendment, Senator Kyl and I have prepared a re-draft of the amendment, which has been distributed to the committee.

In preparing this revised amendment, we have worked closely with victims' representatives, Professor Laurence Tribe, and the Justice Department, whose input has been very helpful.

As President Clinton said, "Change [the Constitution] lightly and you risk its distinction. But never change it and you risk its vitality."

The victim's rights ought to be as fundamental as those of the accused. For all of the victims who have suffered, I believe we can change the future with this amendment, and ensure that they are not victimized a second time by the judicial system, but, rather, accorded the honor and respect which they deserve.

Mr. HYDE. I thank you, Senator. Without objection, the full statements of Senator Kyl and Senator Feinstein will be made a part of the record.

Congressman Royce, would you mind withholding so Congressman Conyers could make an opening statement?

Mr. ROYCE. No.

Mr. CONYERS. Mr. Chairman, I just wanted to say good morning to all my friends here, Jon Kyl, Senator Feinstein. With that, I'll wait until they have finished and then I'll make my opening statement.

Mr. HYDE. Very well. Finally, we have Congressman Ed Royce, who represents the 39th District of California. Congressman Royce was the first Member of the House to sign on as a cosponsor of our proposed amendment, and is a longtime advocate of victims rights, dating back to when he was a valuable member of the California Legislature.

Congressman Royce.

STATEMENT OF HON. EDWARD R. ROYCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. ROYCE. Thank you, Mr. Chairman. When President Reagan's Task Force on Victims of Crime reported in 1982 that the innocent victims of crime have been overlooked, they were not telling us anything that millions of Americans didn't already know. Those millions of Americans are the victims of crime, the law abiding citizens who are so often victimized twice. First by the criminal, and next by the system.

For years, we saw a liberal judiciary expand the rights of lawbreakers and ignore the pain and suffering of crime victims. They created a legal system so out of balance, so tilted toward the rights of the accused, that millions of Americans have lost faith and hope that things will ever be turned around.

I am here to tell you today that we can turn things around, and to ask you to look at what we accomplished in California, as basically a blueprint. In 1982, we passed proposition 8, the victims bill of rights, to give victims the right to restitution and the right to testify at sentencing, probation and parole hearings.

In 1990, we passed proposition 115, the Crime Victims Speedy Trial Act, a measure I authored on behalf of crime victims throughout the State, and considered by many, the most sweeping reform of criminal justice ever attempted in the United States. Among other things, it established in the State constitution, the right of a victim to a speedy trial.

Orange County Superior Court Judge Tony Rackauckas, with whom I worked on Proposition 115 and numerous other victims rights bills, explained the impact of the speedy trial provision of the proposition in this way. "Giving the people their right to a speedy trial is an important part of any program to ensure fair treatment in court for the victims of crime. Clearly, the slower a case moves through the court, the greater is the agony for the unhappy victim."

The speedy trial provision of the proposition 115 has been an important part of the greater progress we have made in Orange County toward swift justice. The judge writes that "prior to its enactment, the criminal justice system seemed hopelessly bogged down." Now we are moving, he says, "criminal defendants through at a much faster pace. Seventy percent of all felonies filed in the county are being disposed of in the municipal courts within a few weeks of the time of filing. Of the 30 percent remaining, most are disposed of within 90 days of their arrival in superior court." This, he says, "is a drastic reduction in the amount of time it takes to complete a criminal case."

Lastly, in 1994, we passed in California, the three-strikes-and-you're-out initiative, a law which today is protecting victims by

keeping repeat felons off the streets permanently. Unfortunately, we had to take each of these measures to the people directly, because the State legislature refused to act even in the face of cases like that of Orange County resident, and now mayor of San Juan Capistrano, Collene Campbell.

In this case, her only son was murdered exactly 14 years ago. The trial and retrial of her son's killers lasted seven years and four months. During that time, she and her husband were removed from the courtroom. They had to sit outside for that whole period of time, while inside the family and friends of the accused were allowed to follow the trial.

Even worse, the Campbells were not notified by the authorities that their son's killers had managed to appeal successfully against their original sentences. They discovered that horrifying truth only when a family friend informed them. Not only have the Campbells had to endure the loss of a beloved son, but also the agony of not knowing where the son's body had been discarded. They could not attend the hearing. She says, "You know, we who have lived through the torture of being crime victims are simply asking to have the same level of constitutional rights as the criminal, no more, no less. That seems fair, doesn't it?"

Well that's one of the things this initiative would do. The bottom line is that victims rights will simply not be adequately protected until we make this change at the national level. This bill of rights is intended to give the victims and their families a voice with which they can present their views in the courtroom. Basically a proper chance to raise objections to perhaps a plea agreement. It is not a means for the victims to obstruct proceedings.

Mr. Chairman, let it not be said that Congress refused to act. That it has relegated victims of crime to a second class status. I urge you to tip the scales of justice back toward those Americans who choose to obey our laws, not break them, to those who through no fault of their own have found themselves victimized and now face a bewildering and too often uncaring justice system.

All the citizens of California are better off today, because we chose to amend our constitution and laws to establish specific rights and protection for crime victims. It's time, in fact it's past time, that we did the same thing here in Congress. I want to thank you again, Mr. Chairman, for holding this hearing.

[The prepared statement of Mr. Royce follows:]

PREPARED STATEMENT OF HON. EDWARD R. ROYCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman, when President Reagan's Task Force on Victims of Crime reported in 1982 that the "innocent victims of crime have been overlooked"—they were not telling us anything that millions of Americans didn't already know.

They were and are the victims of crime—the law-abiding citizens who are so often victimized twice—first by the criminal and next by the system.

For years we saw a liberal judiciary expand the "rights" of lawbreakers and ignore the pain and suffering of crime victims. They created a legal system so out of balance—so tilted towards the rights of the accused—that millions of Americans have lost faith and hope that things will ever be turned around.

I'm here to tell you today that we can turn things around. And to ask you to look at what we accomplished in California.

In 1982 we passed Proposition 8—the Victims' Bill of Rights—to give victims the right to restitution and the right to testify at sentencing, probation and parole hearings.

In 1990 we passed Proposition 115—the Crime Victims' Speedy Trial Act—a measure I authored on behalf of crime victims throughout the state and considered by many the most sweeping reform of criminal justice laws ever attempted in the United States. Among other things, it established in the State Constitution the right of crime victims to a speedy trial.

Orange County Superior Court Judge, Tony Rackauckas, with whom I worked on Proposition 115 and numerous other victims' rights bills, explained the impact of the speedy trial provision of Proposition 115 in this way: "Giving the people their right to a speedy trial is an important part of any program to ensure fair treatment in court for the victims of crime. Clearly, the slower a case moves through court, the greater is the agony of the unhappy victim. The speedy trial provision of Proposition 115 has been an important part of the greater progress we have made in Orange County towards swifter justice. Prior to its enactment, the criminal justice system seemed hopelessly bogged down. Now, we are moving criminal defendants through at a much faster pace. About seventy percent of all felonies filed in Orange County are being disposed of in the municipal courts within a few weeks of the time of filing. Of the thirty percent remaining, most are disposed of within ninety days of their arrival in superior court. Less than ten percent of the felonies filed are pending longer than six months in superior court in Orange County. This is a drastic reduction in the amount of time it takes to complete a criminal case."

And in 1994 we passed the 3–Strikes and You're Out Initiative—a law which today is protecting victims by keeping repeat felons off the streets—permanently.

Unfortunately, we had to take each of these measures to the people directly because the state legislature refused to act even in the face of cases like that of Orange County resident and Mayor of San Juan Capistrano, Collene Campbell, whose only son, Scott, was murdered exactly fourteen years ago. The trial and retrial of her son's killers lasted over seven years and nine months during which Mrs. Campbell and her husband were not permitted to be present. In fact, they were forced to remain outside the court rooms while the family and friends of the accused were able to follow the trial inside the court room.

Even worse, the Campbells were not notified by the authorities that their son's killers had managed to appeal successfully against their original sentences. They discovered the horrifying truth only when a family friend informed them. Not only have the Campbells had to endure the loss of a beloved son but also the agony of not knowing where the son's body had been discarded.

As Collene explains: "my nightmares include the question of how our son actually met his death . . . Don't tell me it is too much to ask that victims are simply allowed to attend criminal proceedings . . . We who have lived through the torture of being crime victims . . . are simply asking to have the same level of constitutional rights as the criminal . . . No more—no less, that's seems fair, doesn't it?"

Tragically Mrs. Campbell later suffered a further loss, this time of her brother, auto racer, Mickey Thompson, who was murdered with his wife.

The bottom line is that victims' rights will simply not be adequately protected until we make this change at the national level. We can't piecemeal this . . . even if all 50 states passed victims' rights laws, they are interpreted by the courts under circumstances where they are trumped by asserted rights of criminal defendants under the federal constitution. That is why an amendment to the U.S. Constitution to protect the rights of crime victims is absolutely necessary.

This bill of rights is intended to give the victims and their families a "voice" with which they can present their views in the court room. Basically, a proper chance to raise objections to perhaps a plea agreement. It is not a means for the victims to obstruct proceedings.

Mr. Chairman, let it not be said that Congress refused to act . . . that it has relegated victims of crime to a second class status. I urge you to tip the scales of justice back towards those Americans who choose to obey our laws, no break them—to those, who, through no fault of their own, have found themselves victimized and now face a bewildering and too often uncaring justice system.

All the citizens of California are better off today because we choose to amend our Constitution and laws to establish specific rights and protection for crime victims.

Its time—in fact its past time—that we did the same thing here in Congress.

Thank You.

Mr. HYDE. Thank you, Congressman Royce. Without objection, your full statement will be made a part of the record. Because the three of you have other pressing matters at 10, we will not question you, but we will solicit your continued cooperation in the evolution of this important amendment. Thank you so much.

Congressman Conyers, would you care to make a statement now?

Mr. CONYERS. Thank you very much, Mr. Chairman. I, like you, come to this hearing with the determination to give as much support as we can to the victims of crime. There's no category of individuals in our criminal justice system more deserving of our special attention and protection. They are victimized not only by the acts of violence, but they are in a sense, victimized a second time by an often uncaring and insensitive criminal justice system.

So what I would hope that we would do is develop a method for helping these persons as much as we can. I think that this Committee on the Judiciary is in much agreement about this objective, both Democrats and Republicans. It is much like the church arson legislation in a sense. I draw some parallels to it, that we all are in agreement. But we have to look carefully at the proposal before us.

Let us not forget that in the 1994 crime bill, under the leadership of this committee, there were involved and contained therein, critical statutory provisions for victims, provisions dealing with compensation, notification, and victim participation. So the victim rights that are proposed in the amendment before us are critical.

I believe in these rights. There are six of them. I think that we should do everything that we can to pass them into law. Now how do we go about doing that? That is not a simple question.

In church burning, in arson against churches, it was a simple matter of strengthening the existing law in several fundamental ways. But when we look at these victims rights, a different picture appears. The victims right to the presence in the courtroom, the victims right to participation in the various stages of the criminal justice process, the victims right to notification of parole, early release, or escape. The victims right to compensation, the victims rights for protection from physical harm by the defendants, and the victims rights to a timely resolution of the matter.

It seems those are the outline under which we are now proposing a constitutional amendment. That is very important. Whenever we approach the Constitution, it is never easy. After a couple hundred years, there are some precedents. There are some ramifications. There are some overlapping. So I begin this journey, recognizing that it's rather late in the season to be contemplating a constitutional amendment, but here we are and here it is. So I'm pleased to be with you, Mr. Chairman, and members of the committee. I look forward to the witnesses testimony.

Mr. HYDE. Thank you, Mr. Conyers.

The next panel consists of three prominent victims' rights advocates. First we have one of the founding mothers of the victims' rights movement, Mrs. Roberta Roper. In April 1982, Mrs. Roper's daughter Stephanie was kidnapped, brutally raped, tortured and murdered. Her two murderers received sentences that would have allowed them parole eligibility in less than 12 years. As a result of her experience, she founded the Stephanie Roper Committee and Foundation, of which she is the director. She is very active in victims' rights activities in Maryland.

Next we have Ms. Christine Long-Wagner. In 1988, Ms. Long-Wagner was raped when a serial criminal known as the Grandview rapist broke into her home while she slept. As a result of that hor-

rible experience, Ms. Long-Wagner became active in victims' rights activities in Ohio. She is now the chairperson of the Victims' Rights Committee of the Law Enforcement Alliance of America.

Finally, we have Mr. Chet Hodgin. Two of Mr. Hodgin's sons were murdered in unrelated incidents in 1991 and 1992. The first son was killed by a disgruntled employee whom the son had fired. The second son was killed by a robber while delivering pizzas. As a result of his experience, Mr. Hodgin has become active in helping victims in North Carolina, and is currently the State vice president of the North Carolina Victim Assistance Network.

We welcome all of you here today. We really appreciate your being here. We look forward to your testimony.

Mrs. Roper.

STATEMENT OF ROBERTA ROPER, DIRECTOR, STEPHANIE ROPER COMMITTEE AND FOUNDATION, INC.

Mrs. ROPER. Good morning. Thank you, Chairman Hyde, and members of the committee. In addition to directing the organization that bears our slain daughter's name, I also cochair the National Victims' Constitutional Amendment Network. I am honored this morning to speak in support of a constitutional amendment for crime victims' rights, on behalf of 43 million Americans who were victims of crime this past year.

I believe the experience of families like mine, clearly demonstrate the need to alter our Constitution to protect crime victims' rights for all times. Fourteen years ago, when our daughter Stephanie was kidnapped, raped and murdered, our family learned firsthand that equal justice under law didn't extend to a crime victim's family. As trusting citizens, we expected to be fully informed, to be present at trial, to be heard at sentencing. To our horror instead, we were excluded from the trial, the most important event of our lives, and at sentencing, denied the right to provide a victim impact statement.

As parents, my husband and I struggled to preserve our family of four surviving children. For them, the American dream was shattered. Everything they believed in, respected, was all but destroyed. Working over the years to assist other victims in families has been a major part of our survival and healing.

Since 1982, we have directed an advocacy and assistance organization that is considered one of the most effective voices for victims in our nation. Consequently, we have seen enormous progress in the State of Maryland that has resulted in the passage of 44 laws, including a State constitutional amendment for victims. However, despite that progress, sadly today, those rights remain paper promises. For too many victims, the criminal justice system remains more criminal than just.

As you know, the President's Task Force on Victims of Crime first introduced and recommended a constitutional amendment in its final report in December 1982. The task force concluded that the American criminal justice system's treatment of crime victims was a national disgrace. That too often, victims were treated like pieces of evidence used and then thrown away. They recommended that to restore an essential balance that was missing the U.S. Constitution would have to be amended to identify and to protect cer-

tain rights for crime victims, rights that would not diminish those of an accused or convicted person, but would offer them the same protection.

The U.S. Constitution is the supreme law of our land. It surrounds a convicted or an accused person with many protections, and rightly so. But in regard to victims, it is silent. Until our Federal Constitution is altered to balance this inequity, victims will always be treated like second class citizens.

Every day, I, as an advocate deal with individuals, families and survivors; individuals like Mrs. Teresa Baker, who is here today. Teresa's only son was murdered. When her son's killer plead guilty to second degree murder and was sentenced to 30 years, no one explained to Mrs. Baker that under the terms of this plea agreement, her son's killer would be reconsidered and released in less than three years. Mrs. Baker came upon this information by chance. Even though she had fulfilled her obligation to receive victim notification, she came upon this by chance. And as painful as that discovery was, her comment was, "Why didn't someone tell me the truth?"

Recently in a triple homicide case in Maryland, the survivors of crime victims had good reason to question the effectiveness of Maryland's crime victims' laws at the sentencing of their loved ones killer. Despite the existence of a statute, requiring the preparation, acceptance, and consideration of a victim impact statement at sentencing, the judge refused to accept them.

Clearly, if we are going to preserve a criminal justice system that protects all of us, we should not reinjure those for whom the system is most dependent upon. Those victims, at a minimum, deserve the right to be informed, to be present, and to be heard. We should never forget that while the State may be the legal victim, the State is not kidnapped, is not raped, does not bleed or die. Victims suffer those consequences.

Critics tell us that we should not tinker with our Constitution. We would agree that constitutions should be amended only for the most serious reasons. But I ask you to remember the wisdom of our Founding Fathers. They were creating a more perfect union, not a perfect one. They recognized that institutions and laws would require the flexibility to change to meet the needs of an evolving society. If that were not so, black American citizens would still be someone's property, and women would be deprived of the right to vote. The whole history of our nation has taught us that basic human rights must be contained in our fundamental law, our Constitution.

Other critics say that this amendment will cause an overwhelming burden to the State. The truth is, there is no evidence that a phone call or a letter will cause overwhelming financial losses or costs or delays. The truth is, that as a Nation, we spend millions for criminals, and pennies for victims. The reality is that the majority of the States and the Federal Government have created crime victims' funds based on convicted offender fines to provide for the delivery of victims' services.

But finally, the cruelest and most undeserved opposition is voiced by critics who say that by allowing victims to be heard at sentencing, we are going to inject irrelevant emotion and create classes of

victims. This is blatantly untrue. This is not about the character of a victim, but the consequences of a crime that someone has chosen to inflict. If my daughter had been a prostitute or a homeless person, she had the right to be free from violence.

This is about the consequences. When victims bring information to a sentencing court or to a post-conviction proceeding, they are bringing a voice, not a mandate or a veto. The system retains the discretion to decide the value of that information and to accept or reject it. But clearly, every crime and its consequences are different.

In conclusion, I ask you to listen to the voices of our people. Ask the American people how they would wish to be treated if they were to become victims of violent crime. In 1994, the people of Maryland responded to our constitutional amendment with an overwhelming vote of 92.5 percent. I am confident that your constituents will tell you that it is time to alter the U.S. Constitution to protect crime victims' rights for all times.

We must remember that the Constitution belongs to the people. When the people enter into a social contract with Government, at a minimum, we expect protection. But when that protection fails, we also expect justice and fairness, even for crime victims. Thank you.

[The prepared statement of Mrs. Roper follows:]

PREPARED STATEMENT OF ROBERT ROPER, DIRECTOR, STEPHANIE ROPER COMMITTEE AND FOUNDATION, INC.

My name is Roberta Roper. I am director of the Stephanie Roper Committee and Foundation, Inc., a Maryland crime victims' group bearing our slain daughter's name. I also co-chair the National Victims' Constitutional Amendment Network. I am honored to speak in support of H.J. Res. 174, a Constitutional Amendment for crime victims' rights on behalf of forty-three million Americans who became victims of crime this past year.

I believe that the experiences of families like mine clearly demonstrate the need to alter our constitution to protect crime victims' rights for all time.

Fourteen years ago, when our daughter Stephanie was kidnapped, raped and murdered, our family learned first hand that equal justice under law did not extend to a crime victim's family. As trusting, law-abiding citizens, we expected to be kept informed of all proceedings, to be present at trial and to be heard at sentencing. Instead to our horror, we were excluded from the trial, which was the most important event in our lives, and were denied the right to provide an impact statement at sentencing. "One person can make a difference and every person should try . . ."

As parents, my husband and I struggled to preserve our family of four surviving children. For them, the American dream was shattered. Everything they believed in was challenged and all but destroyed. Over the years, working to support and assist other victims and families, and to improve the criminal justice system has been a major part of our survival.

Since 1982, we have led a Maryland advocacy and assistance organization that is considered one of the most effective voices for victims in our nation. We have seen great progress in our state, and our efforts have resulted in the passage of forty-four laws including a state constitutional amendment for crime victims' rights. Yet sadly today, those rights largely remain "paper promises." For too many victims and families, the criminal justice system remains more criminal than just when it comes to protecting their rights. Consequently, the proposed federal amendment, is for them, an issue whose time has come.

The President's Task Force on Victims of Crime first recommended a constitutional amendment in its final report in December, 1982. The Task Force concluded that the American criminal justice system's treatment of victims was a national disgrace . . . victims too often were treated like "pieces of evidence" . . . used and then thrown away. They recognized that in order to restore an essential balance that was missing, the United State's Constitution would have to be amended to

identify and protect certain rights of crime victims . . . rights that would not diminish those of an accused or convicted person, but would share equal protection of the law.

The United State's Constitution is the supreme law of the land. It surrounds an accused person with numerous protected rights, and rightly so. However, it is silent in regard to victims. Until a federal constitutional amendment is passed that balances the rights of a victim with those of an accused person, victims will remain *second class citizens.*

Everyday, my work as an advocate brings me in contact with victims and survivors in my state. Individuals like Teresa Baker, whose only son was murdered. When her son's killer pled guilty to 2nd degree murder and was sentenced to thirty years, no one explained that under the terms of the plea agreement the offender would have a sentencing reconsideration and be released in less than three years! And while Mrs. Baker fulfilled the victim's requirement to request notification, she came upon this information by chance. As painful as that discovery was, her primary question was, "why didn't someone tell me the truth?"

Survivors of victims in a recent Maryland triple homicide case had good reason to question Maryland's victims' rights laws at the sentencing of their loved ones' killer. Despite a statute requiring the acceptance and consideration of written victim impact statements at sentencing, the judge refused to accept them.

Clearly, if we are to preserve a criminal justice system that protects all of us, we should not re-injure those whom the system is dependent upon! Victims deserve, at a minimum, *the right to be informed, present and heard* at criminal justice proceedings. We must never forget that while the state may be the *legal* victim, the state is not kidnapped, is not raped, does not bleed or die . . . people suffer these consequences. Victims of these crimes deserve equal fairness and justice.

Critics tell us that we must not "tinker" with the constitution. And we agree that constitutions should not be amended except for the most serious reasons. We must remember and respect the wisdom of our founding fathers. They were creating a "more perfect union," not a perfect one. They recognized that laws and institutions would require the ability to change to meet the needs of an evolving society. If that were not so, black American citizens would still be someone's property, and women would not be able to vote! The whole history of our country had taught us that basic human rights must be protected in our fundamental law . . . our constitution.

Other critics argue that an amendment will create an overwhelming burden on the states. The truth is that there is no evidence that the cost of a phone call or letter, or applying a victim's rights has created financial burdens or delays. The truth is that our nation spends millions of dollars for criminal needs and pennies for victims! The reality is that many states and the federal government have created crime victim funds based on convicted offenders' fees to provide for the delivery of victim services.

The cruelest and most undeserved opposition is voiced by those who say that allowing victims or survivors to be heard at sentencing will inject irrelevant emotion and create classes of victims. *This is not about the character of the victim, but about the consequences of the crime that a convicted offender chose to inflict!* If my daughter had been a homeless person or a prostitute, she had the right not to be violated. The information brought by victims to sentencing courts or at post-sentencing proceedings is *not a mandate or a veto, but a voice.* The system retains the discretion to decide the value of that information, and recognizes the that every crime and its consequences are different.

I urge all of you to listen to the law-abiding citizens of our land. Ask the people of America how they would wish to be treated if they were victims of crime. In 1994, the people of Maryland responded with an astounding 92.5% vote of approval for our amendment. I am confident that your constituents will tell you that it is time to protect victims' rights for all time in the U.S. Constitution. Never before has there been a proposed law, bipartisan in support, that could make such a significant and positive difference in the lives of so many Americans every year. We must remember that the constitution belongs to the people. As part of our social contract with government, the people not only expect protection, but when that protection fails, expect fairness and justice . . . even for crime victims.

Mr. HYDE. Thank you, Mrs. Roper. Normally I intervene at the end of five minutes when the red light goes on, but your statement was so moving and compelling, I wanted to hear it all, as did we all.

But I would request, respectfully, that the other panelists try to confine. I certainly won't cut you off. But try to confine your state-

ments to five minutes. As we will have questions, we can bring these other things out. Your full statements will be made a part of the record without objection.

Ms. Long-Wagner, I did introduce you more fulsomely before, so I won't repeat it. Ms. Long-Wagner.

STATEMENT OF CHRISTINE LONG-WAGNER, SECOND VICE PRESIDENT, LAW ENFORCEMENT ALLIANCE OF AMERICA

Ms. LONG-WAGNER. Mr. Chairman, and members of the committee, I am currently the second vice president of the Law Enforcement Alliance of America, which is the Nation's largest coalition of law enforcement officers, crime victims, and citizens. I am the chairman of the Victims' Rights Committee of LEAA. I am also the victim of a vicious crime committed by a violent repeat serial rapist. Today I speak for LEAA's more than 50,000 members, and from the very personal perspective of what happened to me.

Very early one morning in August 1988, I was awakened in my apartment by a man, a man who 8 years before had raped two other Ohio women. A man who spent minimal time in prison, where at taxpayer expense, had earned a 2-year college degree and used the prison's weightlifting equipment to become a more menacing figure. The man raped me repeatedly for what in real time was barely 1 hour, but in fact, was a lifetime.

He was apprehended after raping another Ohio women, and attempting to rape two more. What that man did to me and at least three other women was foul and obscene. What the criminal justice system did to me after the rape was humiliating and shameful.

LEAA supports the idea that every defendant is innocent until proven guilty. However, an equally important point needs to be addressed, the fact that each of us who bears the physical and psychological scars of a violent crime also have rights. The unfortunate truth is that today victims of crime have no Federal guarantee that we will ever receive justice, let alone fair and equal treatment.

LEAA and the Nation's crime victims support the accused right to confront witnesses. We also ask only that victims have a right to confront their assailants. We support the accused right to due process and to counsel. We also ask that victims of crime be given the right to fair and full participation in the criminal justice process.

LEAA supports the defendant's right to free from unreasonable searches and seizures. But we ask that crime victims be granted the right to be free from a life of continued terror caused by the acts of violent offenders. Let me walk you through that very violent crime, what every violent crime victim experiences, the slow and torturous machinery of the criminal justice system.

Rather than being a source of solace and comfort, it is often a process of horror, often equal to that, the terror of the crime itself. While the violent crime is over relatively quickly, the frustration, the anger and hurt caused by the criminal justice system more concerned with the rights of criminals, often lasts a lifetime.

For rape victims, one of our biggest fears is that the sexual perversions forced on us might literally be a death sentence through the possibility of AIDS. The man who raped me was a known and

previously convicted rapist, yet he could not be made to have an HIV test for fear of violating his rights.

My right to a life without terror meant nothing. I was excluded from the peace of mind provided by a simple blood test. How can anyone support this, after seeing the carnage of rape? What reasonable man or woman can deny us the right to have our assailants tested for HIV or AIDS after they've seen the full and brutal violence of rape: the lacerations on some that run red and blue jagged patterns across a face, a thigh or a torso; the eyes swollen grotesquely shut, the beaten flesh turned to deep purple; cheek bones crushed from heavy blows. And yet, in the name of the defendant's right to privacy, their right against self incrimination and their right to unreasonable search and seizures, the criminal's rights prevail over the victim's.

Knowing the psychological torment crime victims endure in preparing ourselves for the courtroom encounters, defense attorneys often play a postponement game. They hope this psychic torment builds to a point of unbearable pressure so the victim will surrender. Trust me when I say I know how painful it is to prepare for this, only to have a trial postponed. It is absolute torture and I imagine it works for the criminal far more often than we know. This is very real and very painful, and is the reason why victims need the right to a speedy trial.

As terrible as the fear of being infected with the deadly HIV virus was, the total state of ignorance in which crime victims are kept regarding the status of the case is equal or worse. Only days before the man who raped me was sentenced, did I find out I was not going to get the trial that I wanted and expected. I was told that the man who repeatedly raped me was allowed to plea bargain to lesser charges. He raped two women, assaulted two others, and all of our cases were combined. He was allowed to plead guilty to lesser charges.

I had no opportunity to voice my objections. I had only a few moments prior to sentencing to deliver a brief statement on how this crime affected my life. Today, I am still excluded from personally participating in his parole hearings. Had there been a trial, I would not have been allowed to face my assailant during any trial, save for a few moments, if and when I would be called upon as a witness to the crime, not as the victim, but as a witness, as if I had only glimpsed the attacker from the safety of a two story window. Other than testifying as the witness, I would have been excluded from the courtroom during the trial to protect his rights.

This amendment does not damage the rights of those accused of a crime. It simply provides the crime victims to be treated fairly and with dignity due us as human beings and citizens. It allows the opportunity to be informed and present at proceedings involving those who have attacked us. It gives us a voice in those proceedings. It gives us the right to be informed upon the release or escape of our attackers. It provides a basis for a right to reasonable measures of protection and further violence or intimidation by these violent animals.

Although there may be administrative problems or difficulties in protecting victims' rights, I believe that they will not be any more expensive or difficult than what we have done to protect criminals'

rights. After all, isn't this the real question: Don't honest citizens victimized by predators deserve the most protection our society can offer? Shouldn't this be the standard that our criminal justice system is measured against?

As a representative of the Law Enforcement Alliance of America, as a woman whose husband is a law enforcement officer, and as an advocate for crime victims' rights, and as a crime victim myself, I endorse this constitutional amendment. Crime victims, no matter what State they live in, should have their rights protected. Thank you.

[The prepared statement of Ms. Long-Wagner follows:]

PREPARED STATEMENT OF CHRISTINE LONG-WAGNER, SECOND VICE PRESIDENT, LAW ENFORCEMENT ALLIANCE OF AMERICA

Mr. Chairman, members of the committee, my name is Christine Long-Wagner. I am from Columbus, Ohio. I am currently the 2nd Vice President and member of the board of directors of the Law Enforcement Alliance of America, the nation's largest coalition of law enforcement officers, crime victims, and citizens concerned over the lack of real justice in our criminal justice system. I am the chairman of LEAA's Victims' Rights Committee. I am also the victim of a vicious crime committed by a violent repeat serial rapist.

I am here today to represent the views of LEAA'S more than 50,000 members on the Constitutional Amendment before us. And I am here to explain the need for this in a very personal manner.

Very early one morning in August 1988, I was awakened in my apartment by a man. A man who eight years before had raped two Ohio women. A man who spent minimal time in prison where, at taxpayer expense, had earned a two-year college degree and used the prison's weight-lifting equipment to build himself into an even more menacing figure. A man who raped me repeatedly for what in real time was barely an hour but in fact was a lifetime.

A few months later, he was apprehended after raping yet another Ohio woman and attempting to rape two others. What that man did to me and at least three other women was foul and obscene. What the criminal justice system did to me subsequent to my violation by that serial rapist was humiliating and shameful. That is why I have worked for years with LEAA to secure a crime victim's bill of rights. That is why I am here before you today testifying on behalf of the Resolution for a Victims' Rights Amendment.

Much has been said of every defendant's Constitutional rights. Nothing I have to say and nothing I have read in both the House and the Senate versions of these resolutions infringes or erodes those rights in any way.

The Law Enforcement Alliance of America and I personally respect and support every defendant as innocent until proven guilty. However, I am here to point out that an equally important counterpoint to that right needs to be addressed, namely the fact that each of us who must bear the physical and psychological scars that result from violent crime also have rights. The unfortunate is that today, victims of crime—from robbery to the most brutal and dehumanizing crimes—have no federal guarantee that we will ever receive justice, let alone fair and equal treatment under the law.

LEAA and the nation's crime victims support the accused's right to confront witnesses. We ask only that we, the victims, have a right to confront our assailants. We support the accused's right to due process. We ask only that we crime victims be afforded the right to be part of that due process including the right to a speedy trial and the right to expect a fair sentence imposed and that the sentence imposed upon conviction is the actual time that will be served.

We support the accused's right to counsel. We ask only that we victims of crime be given the right to fair representation and full participation in the criminal justice process.

We support the defendant's right to be free from unreasonable searches and seizures. But we ask that we crime victims be granted the right to be free from a life of continued terror caused by the acts of violent criminals.

Yet, today, crime victims like me have virtually no rights.

Prosecutors are entrusted with representing the public's interests, with defending the rights of society against criminal predators. But, when push comes to shove, we who are crime's victims are treated as if we are no longer members of the public.

We are treated as society's outcasts. And that is wrong, as wrong as the crimes committed against us in the first place.

Let me walk you step-by-step through what every victim of a violent crime experiences once the slow and torturous machinery of the criminal justice system begins to move. Rather than being a source of solace and comfort for crime victims, it is often times a process of unimaginable horror often the equal to the terror of the crime itself. While the violent crime is over relatively quickly, the frustration and anger caused by a criminal justice system more concerned with the rights of criminals often lasts a lifetime.

Despite the genuine concern expressed by law enforcement officers and emergency medical personnel at the initial crime scene, the process of horrors every victim encounters at the hands of the criminal justice system begins almost from the moment we dial 911.

For rape victims, it begins once we are able to voice our fear that the sexual perversions forced upon us might literally be a death sentence through the possibility of transmission of HIV or AIDS.

I cannot believe that any judge or officer of the court can stand mute and dispassionate after seeing the carnage of the rape of a colleague, friend or child. What reasonable man or woman can deny us the right to have our assailants tested for HIV or AIDS after they've seen the full and brutal extent of the violence of rape: the lacerations on some that run red and blue jagged patterns across a face, a thigh, a torso; the eyes swollen grotesquely shut, the beaten flesh turned a deep purple; cheekbones crushed from heavy blows; the blood and mucous that covers flesh and torn clothing—all marks found on too many rape victims immediately after being violated. If they miss this graphic first-hand example then they see or read the reports of anal, oral, and vaginal violations of women and children by sexual deviates, and in the name of the defendant's right to privacy, right against self-incrimination, and right to unreasonable search and seizures, the concerns over the criminal's rights prevail.

This known and previously convicted rapist, who raped me and others could not be made to take an HIV test for fear of violating his rights. My right to a life free from terror meant nothing.

I was excluded from the solace provided by a simple blood test. I was excluded from the court's system of due process; as a crime victim, I was afforded no piece of mind, no protection, and no resolution. I was excluded from the courtroom. I could not face my assailant save for a few moments if and when I would be called upon as a witness to the crime. Not as the victim. But as a witness, as if I had only glimpsed the attacker from the safety of a two story window.

Knowing full well the extent of the psychological torment crime victims endure in preparing ourselves for just such courtroom encounters, defense attorneys often play a postponement game. They hope the psychic torment within crime victims builds to a point of intolerable pressure and we will not be able to bear witness. Trust me when I say I know how painful it is to prepare for such an occasion only to have the trial postponed. It is absolute psychological torture. It is very real and very painful and very much the reason why crime victims need the right to a speedy trial.

As terrible as not knowing if I was infected with the deadly AIDS causing virus was, the total state of ignorance in which crime victims are kept regarding the disposition of proceedings against our assailants is equal or worse.

In my case, eleven months after I was raped, I did not learn that the man who assaulted me was given the opportunity to plea bargain to lesser charges until the day of his sentencing. I had no opportunity to voice my objections. I had only a few moments just prior to sentencing to deliver a brief statement to the judge regarding how the crime affected my life.

Just as I was given no opportunity to participate in the system that led up to that plea bargain agreement, I also am excluded from personally participating in future hearings regarding his possible parole.

I would also add before closing that even the process of accessing Victim Compensation Funds set aside by many states is a cold, impersonal, and dehumanizing experience. In my case, the state has to conduct an investigation to determine if I qualified for compensation for medical and psychological counseling fees resulting from my being raped. This took nearly as long as the disposition of the case of my assailant. And every time I incurred further expenses related to the incident I had to reapply and endure yet another nearly year long "investigation" that retraced all the information that was already on file with the compensation authority.

As far as the criminal justice system is concerned, my personal experience, along with the experiences of thousands of other victims each year, demonstrates beyond

the shadow of a doubt that crime victims have no place or value in the current system except as a catalyst to put the criminal justice system into motion.

A close and careful reading of this amendment reveals no infringement of the rights of those accused of crime. It simply asks that crime victims be treated fairly and with the dignity due us as human beings and citizens. It allows us the opportunity to be informed of and be present at proceedings involving our assailants. It gives a voice in those proceedings. It gives us the right to be informed upon the release or escape of our assailants. It provides statutory basis for our right to "reasonable measures" of protection against further violence or intimidation by these violent predators.

Although there may be administrative problems or difficulties in the process of protecting victims' rights, I believe that they will not be any more expensive or difficult than what we've done to protect criminal's rights. And after all, isn't this the real question: Don't honest citizens who get victimized by predators deserve the most protection our society has to offer? And shouldn't this be the standard for our criminal justice system?

As a representative of a law enforcement organization whose husband is a law enforcement officer, as an advocate for crime victims' rights and as a crime victim myself, I endorse this Constitutional Amendment and I say God bless you all for proposing this bipartisan effort to restore the faith of our citizens in our criminal justice system.

Mr. HYDE. Thank you, Ms. Wagner.

Mr. Hodgin.

STATEMENT OF CHET HODGIN, STATE VICE PRESIDENT, NORTH CAROLINA VICTIM ASSISTANCE NETWORK

Mr. HODGIN. Mr. Chairman, members of the committee. I am Chet Hodgin. I am a realtor in Jamestown, NC. I am here today in support of H.J. Res. 174. The first thing I want to suggest is that we forget H.J. Res. 173 because it is a giant step backwards for victims.

I am a volunteer for the North Carolina Victim Assistance Network. I was recently elected as State vice president. My oldest son Keith, was the manager of a cafeteria in Asheville, NC. In May 1991, an employee that he had previously fired came to my son's condo one night looking for revenge. My son was brutally murdered. The perpetrator was tried and convicted of first degree murder. In December 1992, my next oldest son, Kevin, was a pizza delivery man for a well-known national chain. While on the job, he was attacked, robbed, and beaten by a gang of six teenagers. He did not resist. He gave them his money. They continued to beat him. As he was leaving—as they were leaving, while he still lay on the parking lot, they shot him three times.

I have sat through three full-length first degree murder trials. Not only was I horrified at the testimony describing how these animals could savagely murder a human being, I was appalled to see that while our justice system went to great lengths to protect the rights of the defendants, the victim was virtually ignored. It soon became apparent that several factors must be present to make our justice system function. Obviously we have to have a defendant, or there would be no need for a trial. Also a judge, and usually a jury must be on hand. Absolutely essential are the attorneys, both prosecutor and defense. Usually there are witnesses, police officers. When all the elements are in place, our trial can proceed and justice can be done. The one element that is nonessential to our court of law is the victim.

Whether it is a victim of robbery, assault, rape, theft, or as in my case, the family members of homicide victims, we are consid-

ered nonessential. Only when you become a victim do you realize that we have no enforceable rights. I don't mean to imply that I was mistreated in either Buncombe County or Guilford County, NC. In fact, I received very good treatment from both of those district attorneys and their assistants. But as I became more and more active with NC–VAN, I learned that I was indeed the exception.

I received a call one night from a lady in one of our larger North Carolina cities. Her brother had been murdered a few weeks earlier. After seeing TV news stories about an arraignment hearing to be held the following day, she called her DA's office for information. She simply wanted to know what is an arraignment, what does it mean, was she supposed to be present? She called her DA's office for information. Nobody would talk to her. She finally called NC–VAN for help and was referred to me. By the time I talked to her, she was hysterical.

Defendants have a right to be given information about how the criminal justice system works. Victims don't. I talked to another lady last year who had been raped. Her assailant was sentenced to 20 years. Two years later, she was in her neighborhood grocery store, rounded the corner and there he was. She had no idea that he had been paroled and was out on the streets again.

A member of my own community was brutally assaulted and disabled as a result. His attacker was sentenced to 20 years, but was eligible for parole in 2. Last fall, the defendant was scheduled for a parole review the end of October, but it took the victim until the end of January to find out if the parole was granted. Victims have no right to be informed of a defendant's release from incarceration.

During the trial of one of the murderers of my son, the defense was presenting several character witnesses to try to convince the jury that regardless of eye witness testimony about cold blooded murder, his client was really a nice person. Then he made a motion that I and my family be ejected from the courtroom because our presence might prejudice the jury. Defendants have a constitutional right to be informed of, to be present, and to be heard at criminal hearings. Victims do not. Defendants have the right to speak at a guilty plea or sentencing hearing. Victims don't.

A witness before the President's Task Force on Victims of Crime made this simple statement. "Why didn't anyone consult me on the plea bargain? I was the one who was kidnapped and raped, not the State of North Carolina." Victims have no right to be informed of any plea negotiations.

Those of us who work as victim advocates are not trying to lessen the rights of the accused. But victims must have equal rights by law. The scales of justice must weigh equally for both sides. There are literally millions of innocent victims of violent crime in this country, people whose lives have been irreversibly altered by acts of violence, men, women, children, families whose lives have been ruined by the acts of criminals. This is horrible enough, but too often they are victimized again by our judicial process. The frustration and bitterness created for these innocent victims by the imbalance of our justice system is inexcusable.

Twenty States have now amended their constitution to guarantee the rights of victims of crime. People of North Carolina will have

this opportunity to vote next November. Now you have the opportunity to balance the scales of justice. You have the ability to guarantee that the rights of the victim have constitutional protection as well as those of the accused. Please, be aware of the pain of the innocents. Listen to the voices of these crime victims.

Today I speak to you for the millions of victims throughout our country who cry out for justice. On behalf of all of the innocent victims of violent crime, I urge you to support a constitutional amendment to guarantee our rights. Thank you.

[The prepared statement of Mr. Hodgin follows:]

PREPARED STATEMENT OF CHET HODGIN, STATE VICE PRESIDENT, NORTH CAROLINA VICTIM ASSISTANCE NETWORK

My name is Chet Hodgin and I am a Realtor in Jamestown, North Carolina. I am a volunteer for the North Carolina Victim Assistance Network and I currently serve as state vice president. My oldest son Keith was the manager of a cafeteria in Asheville, N.C. In May of 1991, an employee that he had previously fired came to my son's condo one night looking for revenge. My son was brutally killed. The perpetrator was tried and convicted of first degree murder.

December, 1992, my next oldest son, Kevin was a pizza delivery man for a well known national chain of pizza stores. While on the job, he was attacked, robbed, and beaten by a gang of six teenagers. He did not resist. He gave them his money. They continued to beat him. As they were leaving, while he still lay on the parking lot, they shot him three times.

I have sat through three full length, first degree murder trials. Not only was I horrified at the testimony describing how these animals savagely killed a human being, I was appalled to see that while our justice system went to great lengths to protect the rights of the defendants, the victim was virtually ignored. It soon became apparent that several factors must be present to make our system function. Obviously we have to have a defendant or there would be no need for a trial. Also a judge and usually a jury must be on hand. Absolutely essential are the attorneys, both prosecutor and defense. Usually there are witnesses and police officers. When all of these elements are in place, our trial can proceed and justice can be done. The one element that is non essential to our court of law is . . . the victim. Whether it is a victim of robbery, assault, rape, theft, or as in my case the family members of homicide victims, we are considered non essential. Only when you become a victim do you realize that you have no enforceable rights.

I do not mean to imply that I was mistreated in either Buncombe County or Guilford County, North Carolina. In fact I received very good treatment from both District Attorneys and their assistants. But as I became more active with NC–VAN I learned that I was the exception.

I received a call one night from a lady in one of our larger N.C. cities. Her brother had been murdered a few weeks earlier. After seeing TV news stories about an arraignment hearing to be held the following day, She called her D.A.'s office for information. She simply wanted to know: What is an arraignment? What did it mean? Was she supposed to be present? She called the D.A.'s office for information and no one would talk to her. She finally called NC–VAN for help and was referred to me. By the time I talked to her she was hysterical. Defendants have a right to be given information about how the criminal justice system works. Victims don't. I talked to another lady last year who had been raped. Her assailant was sentenced to twenty years. Two years later she was in her neighborhood grocery store and ran into the rapist. She had no idea that he had been paroled. A member of my own community was brutally assaulted and disabled. His attacker was sentenced to twenty years but was eligible for parole in two. Last Fall the defendant was scheduled for a parole review the end of October. But it took the victim until the end of January to find out if parole was granted. (It wasn't) Victims have no right to be informed of a defendants release from incarceration.

During the trial of one of the murderers of my son, the defense was presenting several character witnesses to try to convince the jury that regardless of eye witness testimony about cold-blooded murder, his client was really a nice person. Then he made a motion that I and my family be ejected from the courtroom because our presence might prejudice the jury. Defendants have the constitutional right to be informed of, to be present and to be heard at criminal hearings. Victims don't. 'Defendants have the right to speak at a guilty plea or sentencing hearing. Victims don't. A witness before the Presidents Task Force on Victims of Crime made this

simple statement, "Why didn't anyone consult me on the plea bargain? I was the one who was kidnapped and raped, not the state of North Carolina!" Victims have no right to be informed of any plea negotiations. Those of us who work as victim advocates are not trying to lessen the rights of the accused. But victims must have equal rights by law. The scales of justice must weigh equally for both sides.

There are literally millions of innocent victims of violent crime in this country. People whose lives have been irreversibly altered by acts of violence. Men, women, children, families whose lives have been ruined by the acts of criminals. This is horrible enough. But too often they are victimized again by our judicial process. The frustration and bitterness created for these innocent victims by the imbalance of our justice system is inexcusable.

Twenty states have now amended their constitution to guarantee the rights of victims of crime. The people of North Carolina will have the opportunity to vote for an amendment next November.

Now you have the opportunity to balance the scales of Justice. You have the ability to guarantee that the rights of the victim have constitutional protection as well as those of the accused.

Please, be aware of the pain of the innocents. Listen to the voices of these crime victims. Today I speak to you for the millions of victims throughout our country, who cry out for justice. On behalf of all of the innocent victims of violent crime, *I urge you to support a constitutional amendment to guarantee our rights.*

Mr. HYDE. Thank you very much, Mr. Hodgin. We will now ask for questions from the members of the committee who will be limited rather strictly because we have another panel, and then we have one this afternoon.

So, Mr. Conyers.

Mr. CONYERS. Thank you very much, Mr. Chairman. I congratulate and applaud and admire these three persons before us today. It doesn't take much imagination to appreciate the courage and fortitude in which these tragedies have changed your life, but you have still gone on to determine that you would change this system so that others wouldn't go through what you have.

Let me ask you, Mr. Hodgin, are there any victim rights laws in the State of North Carolina now?

Mr. HODGIN. Not that I'm aware of, Mr. Conyers. We are at the mercy of the individual district attorneys and judges.

Mr. CONYERS. OK. Let me ask you about distinctions you draw between 173 and 174.

Mr. HODGIN. Sir, 173 carries the qualifying phrase, "to ensure that victims of crime are treated with fairness, dignity, respect" and so forth and so on, "unless the court determines there is good cause for the victim not to be present to comment at any such proceedings involving release, the acceptance of plea agreement with the defendant" et cetera, et cetera. So on the one hand, it would give us rights, and then immediately rescind it.

Mr. CONYERS. That's 173?

Mr. HODGIN. Yes, sir.

Mr. CONYERS. OK, so your recommendation to the committee is that we concentrate our attention on 174?

Mr. HODGIN. Absolutely.

Mr. CONYERS. I also should congratulate the two ladies before us because I am sure as a direct result of their activity and organization, there are victim rights laws in both Ohio and Maryland. I'd invite both of you to comment on the nature of these laws, the extent of their coverage, and what you think of them.

Mrs. ROPER. Despite the strength of certain laws in Maryland and a constitutional amendment, I think we still have to best describe them as a roll of the dice. A victim discovers that it is not

their case. They may not hire an attorney. They are totally dependent upon the prosecutor to not only advocate for the State, but for them. Unfortunately that isn't always true.

Additionally—I think if there is one single problem even today in Maryland, it's that most crime victims don't know they have rights, so consequently they don't even recognize when they are violated. No one has told them.

Mr. CONYERS. Thank you very much.

Ms. LONG-WAGNER. If I might, in Ohio, sir, what I feel a lot of these things are, are it looks good on paper and it doesn't come out in the case. I believe in Ohio now the HIV testing can be done, where in my case it was not. One thing that I know is not good in Ohio, their victims' compensation.

When I applied for compensation, it took nine months for them to investigate my case, give me a case number, all this, make sure I'm deserving of this money for counseling, is mainly what I used this for. I applied two more times after that. You would think with a case number and all included, things would move along. It took me 8 to 9 months both of those two additional times. This needs desperate help.

I still cannot be in the courtroom during a trial. He will be up for his first parole hearing in a year. I am not allowed in that parole hearing.

Mr. CONYERS. Can you communicate your views to the parole board or to the court?

Ms. LONG-WAGNER. Absolutely. I have spoken to the head of the parole board. I don't know if we can get it done in a year so I have that right or not. Right now I go in a month before, I talk to two people. They put it on microfilm. If the people have time on the day they do his parole hearing, they may look at it. They may not have time. I feel I deserve the right to tell them what he's done to me, not look at his record of good behavior in prison.

Mr. CONYERS. Thank you so very much.

Mr. HYDE. Thank you, Mr. Conyers. Mr. Moorhead.

Mr. MOORHEAD. Thank you. It's difficult to listen to this testimony without feeling really shaken about things that you've gone through. I practiced law for a lot of years before I came to Congress. Not much criminal law, but some of the things that you've gone through are things that no one should have to. I can not believe that we would refuse to give the victim of a rape the right to have an HIV test of the person that perpetrated that rape after he's been convicted. That's something that's just tragic not to permit.

One of our problems is we are too squeamish to give the adequate penalty to these horrible murderers that we have in our country. We keep recycling them one after another. Many of them have committed a series of murders. We just continue to let it happen.

One thing I am wondering, I would like each one of you to tell me how your situation would have been different if this constitutional amendment were adopted, what it could have changed.

Mrs. ROPER. Well, under Maryland law today, victims do have a right to be informed, present and heard, but again, essentially it's a roll of the dice. And if the accused person chooses to raise his

Federal constitutional right over a victim's State constitutional right, the offender would always trump the victim's right.

It is vastly different today than in 1982, but again, the people that I come into contact with on a daily basis, really represent a trickle, a handful of victims who are informed of their rights. We need to make sure that every State has a basic standard of rights for crime victims.

Mr. MOORHEAD. Ms. Wagner.

Ms. LONG-WAGNER. In my situation as a rape victim, one thing you deal with that's very difficult is needing control again. You have had this control taken away from you during this period. You are desperate for some control. If I had had first of all, this AIDS test done. I had to wait three months for my own to be done. I had a test that was negative. I then repeated it in 3 more months and it was negative. But during this time, it would have helped me immensely to know that he was tested and it was negative.

Control goes back to the fact that I never was sat down. Plea bargaining was not explained to me. They didn't say you have a choice here. If you want a trial, let us know, and maybe the judge then can make the decision. Yes, I want one, and he would make the decision are we going to have one or not, but he would know my feelings. The judge never heard my feelings. I desperately wanted this man to go through a trial.

Mr. MOORHEAD. How were you treated by the police and by the investigating officers?

Ms. LONG-WAGNER. The police, they were the best in the long line of what I went through. They were very considerate. They were excellent. They gave me control. The officer that took me to the hospital, I asked could I clean up this mess quickly as best I could, this fingerprint stuff that was everywhere. I mean I was in a daze. He said, "You take all the time you need." That little bit of control.

Then when I had my examination in the hospital, I said, "I assume you are going to want my fingerprints eventually because they are all over that bed and the bed frame I put together." He said, "Yes, but it can wait." I said, "I'd rather get it done today." That was a little bit more control. I got to choose. So they did an excellent job.

It was further down in the court system that everything went down hill.

Mr. MOORHEAD. Mr. Hodgin.

Mr. HODGIN. Sir, as I stated earlier, I was extremely fortunate. I had good rapport with the district attorney's offices in the two counties that I was involved in. But only after I got involved with the victim assistance network, working as a victim advocate did I become aware of all the problems that existed. I began getting calls from people all over the State telling me their personal experiences, and did I realize that we've got a long ways to go.

My biggest personal experience was sitting in the courtroom and observing that the system was bending over backwards to protect the rights of the defendant, which I have no problem with. But they wouldn't even hear from our side as to what sort of son my son was, and so forth. But it's just the accumulation of stories that

I heard from all over the State that I decided that no, I've got to work to get this changed.

Mr. HYDE. The gentleman's time has expired. Does Mr. Schumer have any questions at this time?

Mr. SCHUMER. Mr. Chairman, I don't have questions. I have a great deal of sympathy for what these folks have gone through. I realize we have to do something on victims' rights.

Mr. HYDE. I thank the gentleman. Mr. Reed.

Mr. REED. Mr. Chairman, I want to thank the witnesses for their testimony, and if they have anything additionally to add, this might be an appropriate time. But I have no specific questions.

Mrs. ROPER. If I may——

Mr. HYDE. Mrs. Roper.

Mrs. ROPER. Mr. Moorhead mentioned something about punishment. I would like to distinguish between punishment and what it is victims want, because too often the two are mixed together. Even more important than punishment is how we treat people as human beings, as Christine said about this control. Not being treated like a piece of evidence, but as a human being deserving of basic human rights and satisfaction with the process.

Mr. HYDE. I thank the gentlelady. Mr. Gekas.

Mr. GEKAS. I thank the Chair. I want to ask a question that would be answerable by any one or all three of the witnesses. But first, I want to outline to the witnesses who have come forth that we have done a great deal as legislators both on the State level and in Congress on the whole array of victims' rights. The gentleman from Michigan who spoke earlier and I in the committee that was relevant at that time, developed legislation on rape crisis and the State organizations that needed additional funding for that, and similar organizations expanded their resources and their powers, et cetera.

I as a prosecutor in Pennsylvania was instrumental, I believe. My ego tells me I was instrumental in a lot of changes of the law then on child abuse victims, a whole list of things. Recently in 1994, we took an extraordinary step of allowing the right of allocution, meaning that a victim would have a right to have a statement at times of sentencing and all of that. So we have covered a lot of the items that are called for in this constitutional amendment.

Yet I have great doubts about the constitutional amendment, I must tell you. But I wanted you to know this little background, that I don't attack it as some kind of outside source that has no feeling for victims' rights, because I have worked all my adult life on behalf of victims' rights, particularly as a prosecutor. For instance, Mrs. Roper stated and this is the most anguishing feature of victims' abuses in my judgment, that she was barred from the trial. I think that that same thing happened to one of the other witnesses, but at least to Mrs. Roper. Well, if we adopted this constitution, there would be no guarantee that you would be able to be at that trial.

If your case started all over again, according to the language of the constitutional amendment proposed, it says "and to be present at every stage of the public proceedings unless the court determines there is good cause for the victim not to be present." We assume, giving benefit of the doubt to the court, that the exclusion

of yourself from that particular trial was based on an exercise of discretion on the part of the judge that he felt was best in the balance of that case. Nothing that we do in this constitution would change, allowing that discretion to apply if this amendment be—I just wanted you to be aware of that. Therefore, it may be an exercise in good feeling, without really accomplishing something to have this adopted.

Also——

Mr. CANADY. Would the gentleman yield briefly?

Mr. GEKAS. Who asked?

Mr. CANADY. Down here.

Mr. GEKAS. Yes. I'll yield.

Mr. CANADY. I think you have hit on a point that is important. However, there's a difference between the two amendments. As one of the witnesses pointed out earlier, that is a feature of H.J. Res 173, which is not contained in 174.

Mr. GEKAS. All right. The other thing that I want to just point out to Ms. Long-Wagner, I, like the gentleman from California am deeply distressed about the HIV test issue. Nothing in this constitutional amendment, in my judgement, would guarantee that to be a mandatory occurrence. I may be wrong, and maybe we can read into it. But the point is, that that's a separate type of issue. I'm on your side on that, but this amendment does not help produce that result.

And speedy trial. That bothers me. We have the sanction now on speedy trial on the prosecutor, that he must within *x* number of days bring a prosecution or suffer the case to be thrown out. Now the prosecution can ask for a delay based on the unavailability of a witness, a witness who is hospitalized or whatever, to defeat that time restriction. How will it work on the other side? What sanction would there be if a speedy trial isn't given to the victim of a crime? Who would be punished, the judge or the prosecutor? Who would be punished? A quick answer to that.

Mrs. ROPER. It would create a parallel right, but the court would still have the ability to decide, just as they decide when the defense asks for a continuation. It just recognizes that if a victim doesn't have a right to a speedy trial, memories fade, people get discouraged, they don't cooperate with the system.

I want to make one other point about your reference to the difference in the language of the two proposed amendments, and that in fact, it would not be a remedy because it calls for cause, good cause being established. The difference in placing a victims' rights within our Constitution is that they have standing, legal standing to even test the law. Maybe not always get the results we want, but to be able to test the law just as an accused person may test the law today.

I think we need to ask ourselves why the rights of an accused person or a convicted offender works. It's because the Constitution requires it. In my case, my husband and I were excluded from the trial because we were subpoenaed as witnesses. Now we had no evidentiary material to bring to the case, but because in 1982 no one questioned the rule on witnesses, it was automatically invoked. The judge never even addressed whether there was good cause for our exclusion. This was a typical abuse of the sequestration rule,

when the rule on witnesses would apply to anyone who was subpoenaed, whether they had any basis for exclusion or not.

Mr. HYDE. The gentleman's time has expired. Mr. Berman. Do you have any questions?

Mr. BERMAN. No.

Mr. HYDE. Mr. Coble.

Mr. COBLE. I thank the chairman. I thank you all for being here, Mr. Hodgin, in particular, from Jamestown. I think you live in my district, although Jamestown is located in two congressional districts now.

Chairman Hyde previously said, and I will reiterate your words, Mr. Chairman. This testimony had indeed been moving and compelling.

Mr. Hodgin, in the case of your sons, were Buncombe and Guilford Counties the two counties involved?

Mr. HODGIN. That is correct, sir.

Mr. COBLE. If I recall, you said you were not displeased with the way it was handled by the "officials"?

Mr. HODGIN. No. I was very pleased in my case.

Mr. COBLE. Mrs. Roper, you said earlier that many people suggested we don't tinker with the Constitution. I agree. But if people don't believe in doing that, and I am one who does not believe in rushing to change the Constitution each change the Supreme Court may hand down an opinion that doesn't strike my fancy. But I think this is an issue where revisiting the Constitution is justified, because I think victims for too long have been ignored.

We have gone to great extremes to protect the rights of the criminal, the wrongdoer. I have no quarrel with that. But I do have quarrel with the fact that victims, as you all have so convincingly told us today, are out in the anteroom, or maybe not even in the courtroom or the courthouse for that matter. You are off way out yonder while "justice" is being handed down by the powers that be.

I think one of the problems, and I'm thinking aloud now for the benefit of the panel, may be for you go to trial and you get a judge and a district attorney who may want to move the clarious calendar. So he calls the parties up to the table. Well let's go for a lesser crime and get this over with. That is no way for justice to be dispensed, in my opinion. Mrs. Roper, as you said, the criminal justice system has become more criminal than just.

What sort of sentences, Mr. Hodgin, were awarded to the murderers of your two sons?

Mr. HODGIN. In Buncombe County, Representative Coble, there was one individual involved. He was convicted of first degree murder. He received a life sentence which would enable him to be eligible for parole in 20 years.

In the High Point case in the six individuals, there were two tried for first degree murder and convicted. Both received life sentences. The remaining four had plea bargains for lesser sentences in return for testifying against the main two.

Mr. COBLE. Mr. Chairman, you know many folks may say well here we are trying to federalize another law because there are State remedies available. But I have been told, and I think correctly so, you all have implied this, that in many instances, if a State district attorney or a State solicitor or prosecutor fails to

carry forward as required by the particular statute, victims have no right to address that matter.

You said, Ms. Long-Wagner, in response I think to the gentleman from Michigan, you are permitted to share your views with the parole commission in written form or perhaps by telephonically. But that's not nearly so convincing as having you there eyeball to eyeball, looking these commissioners in the eye.

Mr. Chairman, I think this has been a very worthwhile hearing. I have done more talking than questioning. But I am just reviewing what you all said. Since my yellow light illuminates, do you all want to add anything quickly before the chairman muzzles me?

Ms. LONG-WAGNER. Excuse me. I have one comment. This goes back to the other comment about the HIV testing. One thing I have to say about this for you today is this amendment is not etched in stone yet. So I am asking you to put that in there.

Mr. COBLE. Well, I really thank you all for coming.

Mr. Chairman, Mr. Hodgin very wisely I think made a distinction between the two resolutions. I don't mean to speak for the chairman, but I don't think we're wedded to either of these two versions at this point. Are we, Mr. Chairman?

Mr. HYDE. No, sir. The amendment, the draft of the amendment is really a work in progress. It is constantly being revised with the Justice Department and with our Senate colleagues. Our final product I think will be something we can all be proud of. Your testimony will add greatly to it.

Mr. COBLE. Mr. Hodgin, I thank you for noticing that.

Mr. HYDE. Mrs. Roper wants to say something.

Mrs. ROPER. I just wanted to underscore something that Congressman Gekas mentioned earlier. I would be the first to applaud the progress made by the Federal Government and the various States in enacting legislation. But I also want to stress what Senator Feinstein said, that they represent a patchwork of rights. What this amendment does is establish a national standard.

Mr. HYDE. Mrs. Roper, when the rights of the defendant are in the Constitution, the rights of the victim ought to be in the Constitution and have equal dignity. There is more to a trial than just the defendant. There is justice. So I have no problem with that. I think the other arguments are really specious.

Mr. COBLE. Mr. Chairman, I thank you, and I thank the panel. For the panel's benefits, our chairman sees red when that red light illuminates, so I'm going to back off.

Thank you, Mr. Chairman.

Mr. HYDE. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I want to thank the witnesses, because it's testimony like this that reminds us of our responsibilities as to what we're doing and the effect it has on people.

Listening to the stories, it's obvious that during your proceedings, you were mistreated. I have concerns similar to the gentleman from Pennsylvania as to whether a constitutional amendment is necessary to deal with them or whether or not they can be dealt with statute. For example, in the question of the HIV test, the gentleman from California pointed out that there ought to be no prohibition against testing after conviction. The problem with HIV is that by the time the conviction has come along, the nature

of the disease and the treatment is you've missed a lot of opportunity for treatment. You need to know immediately. There you have a very serious conflict of someone that's been accused, not convicted, and your need to know as early as possible. Virginia has dealt with this where you can have a very early hearing to determine probable cause. You can get the accused tested at that point. Your test at three months and what not is useless, because if you've been infected, it wouldn't show up in three months.

Ms. LONG-WAGNER. That's what they told me actually.

Mr. SCOTT. So you've got to wait 6 months for your test to show anything. You need to know from the assailant what his test shows. That's information you need. By statute, we were able to balance those competing interests, without having to wait for a conviction.

Likewise, there are other rights that have been dealt with. The idea that you can yank the family out of the courtroom because all of the witnesses are excluded so they can't tailor their testimony as you go along, a lot of defense lawyers in Virginia would subpoena the entire family to get them out of the courtroom. You can't do that anymore by statute. People don't have, as in your case, evidentiary information to present. You can't be tricked out of the courtroom on that ploy. So you've been able to deal with that on statute.

The question that arises, and I think Mrs. Roper, you indicated it, is what happens when the victim's rights and the defendant's rights clash. You indicated if the victim is on statute and the defendant is on constitutional grounds, the constitutional will trump the victim. Is it your suggestion that the defendant's rights not be able to trump the victim's rights if they are both constitutionally protected?

Mrs. ROPER. No. It is not our understanding. By creating parallel rights in our Constitution for a victim as well as an accused person, we allow the system to test that right. As I indicated earlier, clearly there are certain times when the victim will lose. But right now, they don't even have an opportunity to test the law because under our Constitution, we don't exist.

I am always reminded of this need by looking at the words etched in our Supreme Court facade: "equal justice under the law." It doesn't include us victims.

Mr. SCOTT. Well, is it your suggestion that certain defendants rights would be trumped by victim's rights? For example, the right to double jeopardy? If a victim has not been appropriately concluded, could you trump his right to double jeopardy if he was not convicted the first go round?

Mrs. ROPER. Under a constitutional amendment, perhaps the victim would have advance information to in fact appeal to the court before it became an issue that would surround double jeopardy. If they had an opportunity to ask the court to enforce their rights as the trial proceeded, it wouldn't become an issue on which the defendant would be placed in jeopardy for a second time.

Clearly we need statutes to cover other situations. But a constitutional amendment for crime victims is really focused on the primary issues, information, presence, and the right to be heard.

Mr. HYDE. Taking them out of the status of non persons.

Mrs. ROPER. Absolutely.

Mr. HYDE. Thank you, Mr. Scott.

Mr. SCOTT. Mr. Hodgins.

Mr. HYDE. Surely.

Mr. HODGIN. Just a comment. We as victims need the full power of constitutional protection just as the defendants have now. The only problem with statutory protection is that that can change every time the legislature reconvenes. That is no long-term protection.

Mr. HYDE. Mr. Hodgin, if I may interrupt Mr. Scott's questioning period. Some things don't lend themselves to constitutional expression. The Constitution by its nature is a statement of principles. When you get into the nitty gritty, it is not appropriate to put them in the Constitution.

Now the requirement for an HIV test. Boy if there's anything that cries out for a remedy it's that situation. I am not convinced it should be in the Constitution, but there sure ought to be one firm, clear, unequivocal Federal statute with penalties for anybody who doesn't obey it.

Ms. LONG-WAGNER. I'll accept that from you. OK?

Mr. HYDE. We have to be mindful of how we draft this so it's constitutional language and not open to negative interpretations by the court.

The gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman. I want to thank each of the witnesses for their testimony. It was very moving and very helpful testimony. I want to thank the chairman for his leadership on this issue. I think that this is a critical issue for us to address here in the Judiciary Committee. I think it's an issue that needs to be addressed at the Federal level. As a member of the Florida Legislature back in the 1980's, I was the sponsor of an amendment to the Florida Constitution which was submitted to the people of Florida on the issue of victims' rights. I believe they voted on that in 1988 in Florida. More than 70 percent of the people of Florida voted in favor of the proposed amendment to the Florida Constitution protecting the rights of crime victims. I think that's really representative of public sentiment on this issue throughout the country. I think it's high time we addressed it here in Washington. I thank the witnesses for their input, which has been very helpful, and Mr. Hyde for his leadership.

Mr. HYDE. Thank you, Mr. Canady.

Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chairman. Let me also thank the witnesses for their time and coming and providing their testimony. I think every State has recognized the need to provide victims with rights when we have proceedings that are meant to try to find the guilty party. So I think many of the things that have come out I think are very helpful.

I am one who has some concern that we may get to the point of making our proceedings a bit too complicated for the accused. I hope we can always try to resist that. In fact, I appreciate very much that the chairman has submitted his second H.J. Res. 173, to try to address some of those particular concerns.

Let me if I may, ask a particular question of the witnesses. I apologize if you may have been asked this and answered. What are your thoughts of how we reconcile the whole issue of a victim who is also called as a witness and there is some reason for you to be called as a witness, but not a significant reason. You will not determine the outcome of guilt or innocence, but there may be some reason to have you there. So the defense attorney or prosecutor can make the case that you are a necessary witness, or necessary can be defined in different ways.

How do you deal with that, where the defense says well, or the prosecution says, well we don't want that individual who is a victim to be present, to be able to listen to the testimony, fashion his or her statements when he or she gets up on the witness stand. How do you deal with it when you get into that real grey area of whether or not that victim is actually necessary as a witness, and maybe the defense or the prosecution is playing a game of actually subpoenaing you as a witness to keep you out of the courtroom.

Mrs. ROPER. If I may answer. With all due respect, I think we wrongly assume that the mere presence of a victim or some survivor is going to mean that their testimony will become tainted, when we never question that same result occurring when the defendant can hear everyone's testimony.

As someone who advocates and assists victims in courtrooms every day I see victims who understand their role very well. They are intimidated by the process. They know they must not do certain things. They must not shed a tear. All of those things. So to suggest that their mere presence would somehow be a violation of the defendant's rights is inaccurate.

But in the question of subpoenaed witnesses, we can and must accommodate good cause. In Maryland, the victim is presumed to have the right to remain in the courtroom, even if they have testified. The court has to establish good cause for some conflict of their presence. We can accommodate them by calling them to be the first witnesses. But we shouldn't allow the law on witnesses to be abused. As you indicated, historically defense attorneys have subpoenaed families of homicide victims, never intending to call them as witnesses, but simply to exclude them from the most important event of their lives.

Mr. BECERRA. So, Mrs. Roper, I understand you then to be supportive of the language in H.J. Res. 173, which provides the good cause provision in it?

Mrs. ROPER. I think this is a work in progress. I think we need to look at it very very closely.

Mr. BECERRA. OK. I appreciate your comments. Anyone else interested?

Ms. LONG-WAGNER. I think she answered it very well. So I have no extra comment on this.

Mr. BECERRA. Tell me what your impression is, and again, to anyone on the panel, what your impression is of the influence that a victim can have on a judge or a jury when it comes to sentencing. How helpful is it and how hurtful in the eyes of the defendant might it be?

Mrs. ROPER. The victim's voice is just that. It's neither a mandate or a veto. It's a piece of information. Just as the court is re-

quired to know everything about a criminal defendant, and now a convicted offender, we also need to know about the consequences of the crime, because every crime is different.

As I indicated in my testimony, it's not about the character of the victim, but the consequences of the crime.

Mr. BECERRA. Anyone else?

Mr. HODGIN. A defendant has every right to have all kinds of character witnesses. He can have his minister, his teachers that he hasn't seen in 20 years. They clean him up. They give him a haircut. They put on fresh clothes. This is all designed to intimidate the judge and the jury. Why should the victim be treated any less?

Mr. BECERRA. Your sense again, anyone, and Mr. Chairman, this will be the last question. Your sense of if we don't do this, if we don't have a constitutional amendment, what will be the effects over the next 5 or 10 years? What are we looking at in terms of real effects to America?

Mrs. ROPER. Victims will continue to be treated like second-class citizens. Every day victims and survivors tell me of their reluctance to cooperate with the system. They say, "Why should I care? Why should I cooperate? Who cares about me?" When they take off from work for repeated continuations on a trial, when they are shut out of the courtroom and are outside somewhere, they say, "Why should I bother?" That was the conclusion of the President's Task Force in 1982.

More than 50 percent of the victims said that they would not report a second crime, because in that process, they were injured to a greater degree than the original criminal offender. That is a sad and tragic commentary on our system of justice.

Mr. HYDE. The gentleman's time has expired. The gentleman from California, Mr. Bono.

Mr. BONO. Thank you, Mr. Chairman. It appears that I don't understand the law the way many of the members here do. It appears to me that you probably didn't until these crimes occurred. You have all educated yourselves very well and have a much greater understanding of the law than you did before these things occurred.

I am guessing, but I would assume that you thought you had certain rights. Then when you went into court, where you were astounded to find out that the limitations that you did have as victims. Therefore, you were angry enough to try to do something about it.

I commend you for that. I think it so important that victims do that, because you don't have the value of the technical knowledge that the legal system has until you have experienced it. Having the knowledge that you have displayed today is wonderful.

I just want to say that I totally agree with you. It appears to me that the overall statement is we want a level playing field. You don't want to demean anybody's rights or take away anybody's rights, but you at least want equal rights. I think that is so important to pursue, I am so pleased that you are.

I basically operate on logic. When you tell me that you were raped and you can't test the raper for HIV, I can't imagine why on God's Earth a law like that would exist. But apparently it does,

which is staggering. Why you can't you be at a trial in which you were the victim, because somebody pulled a trick on you?

Sometimes when I observe courts, I see the games that go on. To many different degrees, they are rather disgusting and unfortunate. But they occur. You are doing something about that.

I just want to say to you that this member will do anything I can to help you in your quest. Please pursue your quest so that you at least get an equal playing field. If you need more, I am available to do whatever I can to get an equal playing field. That's fair for anybody to ask. The notion that the underdog has to be the victim is appalling and makes me sick, frankly. So I congratulate you and I am very impressed by the knowledge that you have acquired. I hope you pursue that. I just want to let you know that you can certainly depend on me to do whatever I can to help you in this attempt. Thank you.

Mrs. ROPER. We thank you all for listening to us. But Mr. Bono has identified a fatal mistake we all make, confusing logic and reason with the law. Every day I am in courtrooms and unfortunately, with all respect to the players, very often the judge will direct the clerk to get the Maryland statutes and hand them to me to identify the victims' rights and if they apply in this case.

Mr. HYDE. Many times the law isn't so bad, it's the interpretation that the law is given by some of our enlightened courts.

Mrs. ROPER. And this amendment will allow us to test it.

Mr. HYDE. The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I thank you for these hearings on an age-old consistently human problem of people being victims. I would imagine the act upon or by the brothers Cain and Able, first characterized or defined what is to be an unwilling victim.

Mr. Chairman, I would like to submit for the record my opening statement, and would ask for that submission.

Mr. HYDE. Without objection, so ordered.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you, Mr. Chairman. This hearing today involves an issue that is important to millions of Americans. There is no question that a significant number of Americans can identify a family member, friend or acquaintance who has been the victim of a crime. Over the last decade, the friends and families of crime victims have organized themselves and have become very vocal on ensuring that criminal defendants are adequately punished for their crimes.

The purpose of this hearing, which is to examine two proposed constitutional amendments relating to the rights of victims, signals that the victims rights movement has truly arrived. Nevertheless, amending the Constitution is a serious undertaking that requires reflection and careful deliberation.

Since 1787, there have been numerous attempts to amend the Constitution. Most attempts have been unsuccessful. There have only been 27 amendments to the Constitution in 209 years of its existence. The framers of the Constitution were wise enough to craft exacting requirements for amending the Constitution two-thirds majority of both the House and the Senate, and ratification by three-fourths of the states or the convening of a constitutional convention by 38 states.

As members of the Judiciary Committee, we have an obligation to take seriously the views of those Americans who believe the rights of victims are so fundamental that such rights deserve to be enshrined in our Constitution. Crime is a major problem in our society and we have spent considerable time during the 104th Congress debating and considering legislation to prevent crime, improve law enforcement and adequately punish criminals.

Additionally, we have an obligation to take seriously our responsibility to consider amending the Constitution only to articulate basic and fundamental rights and not use the amendment process to achieve insignificant or purely political objectives.

President Clinton has stated that he supports a victims rights amendment in principle but has not focused on the particular language of such amendment.

We will hear testimony from various witnesses on two proposals, H.J. Res. 173 and H.J. Res. 174. Both proposals state that these rights would apply primarily in the context of violent crimes and other specified crimes. Before examining those proposals, we also need to examine the current state of the law with respect to the rights of victims, particularly as it relates to violent crimes.

I am very interested in the testimony that we hear today because I believe that both the proponents and opponents of a victims rights amendment to the Constitution are sincere in their views. I look forward to a spirited debate on this important issue.

Ms. JACKSON LEE. I too believe that we have had many occurrences that have tragically highlighted the sometimes inequity between those who are accused and those who are victims. In the State of Texas, for a very long time, victims rights groups had pressed our State leadership to allow them in instances where there was the death penalty, to be able to view that. Of course the debate raged on for a long period of time, for many thought that that would be a hindrance of sorts. I think after the matter was reviewed in the proper light, those victim groups were, if you will, prevailed. But at the same time as they prevailed, the State recognized that it must be handled in a humane manner as well, when victims would be able to view, if you will, the taking of a life pursuant to the justice system.

I am curious about this constitutional amendment, because you have made very compelling statements and arguments today. Needless to say, all of us come from jurisdictions where we have interacted with victims of which we wish we had not. We would have preferred seeing them at some charitable event or some celebration like July Fourth, but we see them in their humanness.

I would only seek your, if you will, opinion or assessment, and I'll ask all three of you, as I look at some of the States that have constitutional amendments, I see there is one in Ohio. Did I understand that one of the witnesses is from Ohio? OK. I would appreciate the understanding, because you have been very kind of us this morning. You have said these are works in progress, we want to work with you. I appreciate that attitude. That we would not want to do anything to a constitution that takes away its stability and the sacredness of the document. We have faced that over the last 2 years of the time that I've been in Congress. Many of us have sensed that the Constitution has lasted because if its integrity.

So as I look at some of the States that have offered constitutional amendments that deal with victims' rights, help me understand how these provisions, which I believe are extremely credible and fair, the notice provision, the right to be heard at sentencing, certainly the notice of an offender's escape or release so that you are not threatened every day of your life in terms of wondering as you look over your shoulder. The physical protection from the defendant, recognizing that though we would not want to have criminal minds and criminal actions, people do do criminal acts. There is some psychic to that that brings about potentially a violent character.

I believe in rehabilitation. I believe in opportunities to invest on the front end so that we don't get these kinds of people. Tragically, we do have them. But if you would just comment on how the Federal constitutional amendment, the amending of the Constitution would be more effective than what I see here has taken up in at least a large number of States, and I understand that two others, Connecticut and Indiana, are on the ballot.

Mrs. Roper, if you would start, I'd appreciate it.

Mrs. ROPER. Well, first again, I would like to repeat what Senator Feinstein said that as good as the existing statutes and State constitutional amendments are, they represent a patchwork. We need a level standard—a blanket, if you will, to cover any victim of any crime. There isn't a better example of this need today than the victims of the Oklahoma City blast. These victims not only have suffered the tragedy in their personal lives, but have the inconvenience of having to go to another State for a trial. They are in Colorado, which has one of the strongest constitutional amendments. Yet they are discovering that as Federal victims of crime, that constitutional amendment does not apply to them.

I understand that the judge has indicated that he will exclude even nonsubpoenaed witnesses from that proceeding, because of the potential for their statements at sentencing.

Mr. HYDE. The gentlelady's time has expired.

Ms. JACKSON LEE. Mr. Chairman, I would appreciate——

Mr. HYDE. The gentleman from—I'm sorry?

Ms. JACKSON LEE. Your indulgence. I had asked all three of them to comment.

Mr. HYDE. I understand that, but we have another panel. The gentlelady's time has expired.

Mr. CONYERS. Could I ask, Mr. Chairman, that someone else——

Mr. HYDE. You want a unanimous consent for another 2 minutes?

Ms. JACKSON LEE. I would greatly appreciate it, Mr. Chairman.

Mr. HYDE. Very well.

Ms. JACKSON LEE. So asked.

Mr. HYDE. Without objection, an additional 2 minutes for Ms. Jackson Lee.

Mr. CONYERS. Thank you, Mr. Chairman.

Ms. JACKSON LEE. Thank you, Mr. Ranking Member and Mr. Chairman.

Ms. Long-Wagner.

Ms. LONG-WAGNER. I will comment very shortly. Yes, Ohio is on the list, but again, there are many options open or missing for victims. Again, I could not be in the courtroom if this happened to me today. I could not and I still can not to this day be in on the parole hearing, which is very important to me. It's coming up in a year or so. I talk with victims from other States. We discuss what do you have, what do I have. They don't compare at all. Some people have no victim's compensation at all. So again, uniformity I think is the big issue.

Ms. JACKSON LEE. Thank you.

Mr. HODGIN. I think the key is your own comment that we have 20 States with existing constitutional amendments, but they are all different. We need a standardized protection throughout the land.

Ms. JACKSON LEE. I thank you. Mr. Chairman, I thank you. And I thank you for presenting it to us that we need to explore this. We need to find the best resolution and solution. You have raised the problems. Now we need to find the solutions.

I yield back the balance of my time. Thank you for being here.

Mr. HYDE. Thank the gentlelady. The gentleman from North Carolina, Mr. Heineman.

Mr. HEINEMAN. Thank you, Mr. Chairman. Let me add my welcome to the panel. I know this has been very stressful for you, telling us of your stories. I think as an advocacy group, not only you but those in the audience, are a credit to advocacy groups. You are taking your initiative to the Congress of the United States and attempting to amend the Constitution of the United States. That is the epitome of effort, in my opinion.

But let me just say that I think this is the right time for this. This committee has dealt with Megan's law as it relates to knowledge and disseminating information to neighbors about sex offenders. We're about to embark, and we had a hearing on the juvenile justice system. Hopefully we'll be able to do something about that to cure the defects. Example, in Durham, NC—I am from Raleigh, NC, and I am a 38-year law enforcement officer, 39 years. We just had an 18-year-old criminal cut loose from a maximum sentence he got for murdering an 83-year-old woman with a hammer. She had hired him to do ground work in her home. Being he was only 13 at the time, he could only be sentenced until he was 18. That in itself is a criminal. That in itself was criminal in indicting of the system.

But to compound that is the fact that people can now not even know what crime he committed. We as citizens can't even know what his name is. So you have a problem here, and we all relate to it. Certainly law enforcement has been very supportive, because law enforcement is at the ground level of this. Next to the victim and the victims' families, law enforcement is there to hear the cries and see the blood. I think the further you get away from the problem, the less sensitized you are to the problem. I think mandating victims' rights to a constitutional amendment is the way to go. I identify with my colleague, Mr. Bono, and you certainly know that you can count on me and most, if not all, members of this committee to further your cause.

Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Heineman. The gentlelady from California, either one of you. Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman. To the witnesses, let me join with my colleagues in saying to you that no one should have to experience what you have experienced. We all admire your courage and wish that we could put an end to violence and violations of human beings in the way that you are describing today. I think that most people, legislators, nonlegislators, would like to do everything that they can to make sure that there's fairness, there's justice. These laws are very complicated. The ways by which we try to access justice are very very complicated.

Let me just ask you, do you think there is any reason that a judge would have for excluding from trial? What about violence in the courtroom or perceived violence in this courtroom as indicated

by someone very angry about what has happened to them, a threat to a defense attorney, any of that. Do you think any of that is reason, would be reason for a judge to make a decision about how they secure the courtroom?

Mrs. ROPER. Certainly it would be reason for exclusion. Victims and survivors have to conform their behavior to the court standards just as everyone does. Again, as someone who is in the courtroom supporting victims all the time, if there is any abuse of that privilege to be in the courtroom, it's often by the families of the defendant, who will disrupt the court by their emotional outbursts. Very often the courts don't do anything about that.

Ms. WATERS. I'm sure that is true, but I guess what I'm saying, as legislators, those who craft the law, we have to do it with an eye toward all the possibilities. I for one, am increasingly concerned about restraints that we put on judges, whether it's mandatory sentencing or other things.

I guess my question is, when we craft a law, if for example, this was going to move forward, should it be so absolute that the judge would have no discretion, or because the question was raised about whether or not in this attempt to craft this amendment, too much discretion was being given to a judge when you give a little out there to say that unless there was some reason by which the judge felt that a decision should be made to exclude.

I am trying to get you to take a look at whether or not an amendment, should it go forward, should be crafted so that there was no discretion, or should they have the ability to have some discretion to secure that courtroom?

Mrs. ROPER. No victims' rights will ever be absolute. This proposal doesn't take away the court's discretion. But it does create a parallel right in which the victim can be respected——

Ms. WATERS. I'm sorry. I can't see the name of the gentleman on the end.

Mr. HODGIN. I am Chet Hodgin.

Ms. WATERS. Hodgin.

Mr. HODGIN. Correct.

Ms. WATERS. He was the one who raised the question about the kind of a little bit of an escape clause.

Mr. HODGIN. Exactly.

Ms. WATERS. I guess maybe the question would be more appropriately put to you. You did raise that as a concern. Are you giving us in this amendment you said, the right to be present and yet taking it back because you offered some discretion to the judge? I guess I ask, should there not be some discretion or should it be so airtight that they would not be able to do it under any circumstances?

Mr. HODGIN. Ma'am, I am not an attorney to interpret every specific instance. But I'm saying would you jeopardize the rights of 43 million victims because one might misbehave? I would think there's a bigger danger of the defense abusing that privilege by putting us right back where we are now and having the right to keep us out of the courtroom.

Ms. WATERS. OK, thank you very much. I was concerned also about the HIV testing. I was pleased that my colleague was able to describe how that has been dealt with in his State, when he in-

dicated that of course I don't think most people would agree that an accused person could arbitrarily be tested. None of us would have any problems with a convicted person. But many of us would have problems with one who is accused prior to conviction, being able to be tested or have other things happen prior to that decision being made.

But when he described that they have found a way with probable cause to be able to test, do you think that's a reasonable solution to it?

Ms. LONG-WAGNER. I think that's reasonable. In my case, I had DNA testing done. They still, I mean he was flagged. As much as you believe in DNA testing, I don't know, but that came across. I was raped in August. The DNA testing was in January, came back in January. I still couldn't get it at that time.

Ms. WATERS. So probable cause probably in your case would have worked with the DNA. If we had legislation that looked at some of these matters in a very particular way, I think even if this passed, that wouldn't take care of that. But some of us would be very supportive of well-crafted legislation to deal with some of the particulars such as the HIV, where DNA would certainly be probable cause which would allow for that testing to be taking place. I think we still maybe need that.

Mr. HYDE. The gentlelady's time has expired.

Ms. WATERS. But you would support that?

Ms. LONG-WAGNER. Yes. I would.

Ms. WATERS. Thank you very much, Mr. Chairman.

Mr. HYDE. Thank you. The gentleman from Illinois, Mr. Flanagan?

Mr. FLANAGAN. Thank you, Mr. Chairman. I thank the panel for coming today. I think it's important to observe that in the last 20 years or so, the victim has become almost baggage to the crime. The criminal enjoys enormous celebrity because of what he has done. Yet, how many of us can name one of the victims of John Wayne Gacey? How many of us can came one of the victims of Jeffrey Dahmer? How many of us can give us the first name of the Menendez parents? There aren't many.

But in the not very recent past, we used to concentrate on the victim and the horrors of the crime. I mean Manson's actions were often called the LoBianco murders. We've had a change here. The criminal enjoys a celebrity status that is abhorrent. But worse, with the victimization of America, bad actors believe that they are a victim of some kind or another. Consequently, we tend to mitigate the actions of criminals because of their own personal circumstances. "Forgive me for killing my parents because I'm an orphan." It's a horrible thing, and it's a terrible place to be.

The chairman has brought a very thoughtful amendment to us today, because what it does is once again, focus on the fact that when a criminal acts, he not only acts against the State and consequently the State acts in a retributive or deterrent fashion, but he also acts against the personality, against someone who has been individually and personally harmed by an action. That victim should have some rights afforded or to the immediate family of that person as the case may be. I applaud the chairman for his ac-

tion today, and I applaud you for the courage of your testimony and the importance of your testimony.

I believe as we go through this amendment, as we discuss it further, as we refine it, as we work on it, I trust that the committee and the public debate in general will realize the importance of a new emphasis upon the particular personality most directly harmed by the actions of the criminal. With that focus in mind, I think that if nothing else, then this amendment or at least the debate about this amendment, will have the courts acting in a way that is more responsible to the victim as opposed to the abstract law or to the greater good served by a particular interest filing an amicus curia brief or whatever it may be.

That it is so important in the law, that when horrible acts are committed against people those people should not sit stone silent because the law provides them no avenue to participate in telling the full impact of the action, to fully describe the crime, apart from its legal definition and the elements involved in there. But its scope of impact as it has applied to the families of the victims or the victim, should he survive, I think is important testimony in a trial. I think it's important that people know that. I think it has actual merit and value in describing the crime itself. This amendment would go a long way toward accomplishing that.

Many States in the union have already seen fit to include this. As is often the case, the Federal Government is a little behind the power curve, as the States leap ahead. But our chairman has kept us in a position of at least staying modestly current. I applaud him for it. I thank the chairman for his time. I thank the witnesses for their testimony. I have no questions.

Mr. HYDE. I thank the gentleman. This panel will be excused. I want to say before you leave, it's very difficult to deal with these subjects. The mystery of suffering and why me, Lord, is just that. It's beyond our understanding.

The important thing is what do you do with that suffering. Do you retreat to self pity or do you try to make something positive out of it. You have done that. You have taken an indescribable grief and suffering and you turned it into trying to help your fellow human beings. You are doing that. You are really doing that. You are helping untold, countless people avoid the suffering that you have endured.

This is a long torturous process, but we're moving. We're on the way. We're on horseback and we're going ahead. But I look upon you as authentic heros. I salute you. We're all the better for having heard you this morning. Thank you.

Ms. LONG-WAGNER. Thank you for your time.

Mrs. ROPER. Thank you.

Mr. HYDE. Mr. Reed, Congressman Reed of Rhode Island has asked to introduce one of our next panel. So if our next panel would move forward.

The Chair recognizes the gentleman from Rhode Island, Mr. Reed, for purposes of an introduction.

Mr. REED. Thank you, Mr. Chairman. It is a great honor for me to welcome to the Judiciary Committee our attorney general, Jeffrey Pine. Attorney General Pine, in the last several years in Rhode Island, has established a reputation as not only a superb law en-

forcement official because of his great experience as a prosecutor, but also as an individual with unimpeachable integrity and total dedication to public service. He makes all of us in Rhode Island very proud of his service as attorney general.

I know he will offer a great deal in terms of his testimony because of his experience and because of his sense of justice, and because of his commitment to justice, which he exemplifies in the State of Rhode Island. So welcome, Jeffrey.

Mr. PINE. Thank you, I appreciate it, Congressman Reed.

Mr. HYDE. Next we have Ms. Elizabeth Semel. Ms. Semel is a private criminal defense lawyer in the San Diego law firm of Semel & Feldman. She has written and spoken extensively on topics relating to the criminal justice system. She appears here today on behalf of the National Association of Criminal Defense Lawyers.

I hope I didn't mispronounce your name.

Ms. SEMEL. You pronounced it correctly, thank you.

Mr. HYDE. Thank you. Finally, we have Ms. Ellen Greenlee. Ms. Greenlee is the chief defender in the Defender Association of Philadelphia, which provides criminal defense attorneys for indigent persons. Ms. Greenlee has extensive experience in criminal defense work and appears here today on behalf of the National Legal Aide and Defender Association.

We certainly appreciate your coming here today and we look forward to your testimony. We ask that you confine it, if you can. We won't be too arbitrary, to five minutes, with the understanding that questions will be asked and that your full statements will be made a part of the record.

Mr. Pine.

STATEMENT OF JEFFREY B. PINE, ATTORNEY GENERAL, STATE OF RHODE ISLAND

Mr. PINE. Thank you. Good morning. Thank you again, Congressman Reed.

It's an honor to have the opportunity to address the members of this committee on a subject which is of great importance. It's important to the victims of crime, and it's important to the integrity of our system of justice.

I want to preface my remarks by stating that the testimony I'm about to give reflects my own views as attorney general of Rhode Island, and not necessarily the views of all State attorneys general or the National Association of Attorneys General.

Throughout our history as a nation, our courts have placed great emphasis on the constitutional rights of criminal defendants. As Rhode Island's attorney general, I am mindful, grateful, and supportive of these basic rights. But as a career criminal prosecutor, I am also mindful of the importance of ensuring that victims of crime be treated with fairness, dignity and respect throughout the criminal justice system, and that our system finally recognize certain basic rights possessed by all victims of crime.

I submit to you that after careful consideration and debate, an amendment to the U.S. Constitution which would ensure that victims of crime can participate and have their voices heard in a court of law is both appropriate, essential, and most importantly, just. In Rhode Island, we do have a constitutional provision specifically

providing that the government of our State has been established for the protection, safety, and happiness of the people. The declaration of rights contained within the Rhode Island Constitution further provides that victims have a constitutional right to be treated with dignity, respect, and sensitivity during all phases of the criminal justice process. And the constitution provides in Rhode Island that these rights should be included among those that would constitute the paramount obligation in all legislative, judicial, and executive proceedings. Rhode Island laws also have a victims' bill of rights statute, which implement in statutory form, the constitutional principles referenced earlier.

We should note that in Rhode Island, the attorney general's office prosecutes all felony cases statewide, much like district attorneys do in most other States. As a criminal prosecutor in Rhode Island since 1979, I have personally prosecuted the most heinous of crimes and convicted the most violent of defendants. So I therefore say it's not only my personal view, but my professional experience that having victims participating and involved at each stage of the judicial process helps prosecutors do a better job from arrest through parole.

From my perspective, the bottom line is that justice must be done in all cases so that the system yields a result that is fair to both the defendant and the people of the State. Part of that process should include the voice of the victim. We're not talking about special rights for a special class. There are all too many Americans who are victims of crime. Forty-three million of our parents, children, brothers, sisters and neighbors are victims each year. These are the people we see day and night in shelters and hospitals, clinics and doctors offices.

We know all too well that after the crime is committee, victims may encounter many mental, physical, and economic challenges. As a prosecutor and elected official, it is my job to make them feel a little less uneasy, a little less frightened, more informed, and more understanding of what they may encounter as a victim. In our State, our victim witness unit sees first-hand the toll of crime upon women, children, the elderly. We prosecute all kinds of crimes from sexual offenders to drunk drivers, to homicides. We run the gamut.

I believe that the constitutional amendment in our State and the victims bill of right statute has worked well and made our court system both more accountable and more respected by our citizens. Victims and their loved ones come to court knowing that nothing can change or undo the harm that has been committed. When a life has been taken, there is nothing we can do to bring it back. When a child's innocence is lost because of a molestation, the lifelong damage is not erased by a trial or a conviction. But in our pursuit of justice, we can and we must work to ensure that victims have respect for and confidence in our judicial system. We must continue to work to ensure that our system of law and justice is respected. The words of George Washington are as true today as they were articulated more than 200 years ago. "The administration of justice is the firmest pillar of Government."

I have worked with hundreds of victims of crime and explained our criminal justice system to parents grieving over the loss of a child. I have witnessed the courage of women who have come for-

ward brutalized by sexual assault. It takes a great deal of personal strength and courage as you heard from the earlier panel. Often we explain to them that the procedures we have in place to protect the rights of the accused, and I know that they wonder what about my rights. However they articulate it, what they are looking for is one thing, justice. They gain that sense of satisfaction when a jury in their case convicts the accused, when they walk out of a courtroom with a sense that someone cared about their suffering, that someone believed their account of the facts, and that society has given them an outlet to redress the wrong that was done to them.

Critics might say that adopting this kind of an amendment trivializes the Constitution. I disagree with that notion. I think the value of these constitutional provisions is illustrated by the many victims in our State who make use of their right to address the court at sentencing. That right gives them an official forum in which to stand face to face with the defendant, asking the sentencing judge to hold that defendant accountable for the harm that the victim has suffered. I have seen the empowering effect that this has on victims. I think recognizing the unique status of victims in the Constitution is an important part of assuring that both our State and Federal judicial systems deliver on that promise of justice.

Mr. HYDE. Could you conclude, Mr. Pine.

Mr. PINE. Yes, I will, sir. I am generally reluctant to amending the Constitution. But I think with appropriate discussion, intelligent debate, and careful consideration, victims of crime are entitled to a codification of those rights. I think that there has to be an unambiguous guarantee that they participate in the process.

I also think that it is important to articulate or comment on reservations about these kinds of measures. There are generally three. I'll just briefly outline them. I know that there will be questions. Generally, people who are concerned about a constitutional amendment are concerned that any amendment not create a private right of action for damages against a prosecutor or other State or local official who makes a good-faith attempt to comply with its provisions.

Secondly, those opposed are concerned that any amendment not give victims absolute veto power over discretionary decisions typically left to law enforcement and prosecutors, such as charging or sentencing recommendations.

Third, there are those who are concerned about the effect of any Federal constitutional amendment on State constitutional or statutory provisions affording victims certain rights in their State criminal justice system.

To that end, the National Association of Attorneys General has appointed a working group chaired by the Missouri Attorney General Jay Nixon to analyze these issues from a prosecution point of view. We look forward to sharing that analysis with you and to working on this issue, as you have indicated. Speaking as the Rhode Island attorney general, I am confident that a meaningful amendment can be drafted to address these concerns. I look forward personally to working with you to do that. Thank you.

[The prepared statement of Mr. Pine follows:]

PREPARED STATEMENT OF JEFFREY B. PINE, ATTORNEY GENERAL, STATE OF RHODE ISLAND

Testimony of Rhode Island Attorney General Jeffrey B. Pine:

THANK YOU, MR. CHAIRMAN. IT IS AN HONOR TO HAVE THE OPPORTUNITY TO ADDRESS THE MEMBERS OF THE HOUSE JUDICIARY COMMITTEE THIS MORNING ON A SUBJECT OF GREAT IMPORTANCE TO THE VICTIMS OF CRIME AND TO THE INTEGRITY OF OUR SYSTEM OF JUSTICE.

I WANT TO PREFACE MY REMARKS BY STATING THAT THE TESTIMONY I AM ABOUT TO GIVE REFLECTS MY VIEWS AS ATTORNEY GENERAL OF RHODE ISLAND AND DOES NOT NECESSARILY REFLECT THE VIEWS OF ALL STATE ATTORNEYS GENERAL OR THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL.

THROUGHOUT OUR HISTORY AS A NATION, OUR COURTS HAVE PLACED GREAT EMPHASIS ON THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS. AS RHODE ISLAND'S ATTORNEY GENERAL, I AM MINDFUL, GRATEFUL, AND SUPPORTIVE OF THESE BASIC RIGHTS.

BUT AS A CAREER, CRIMINAL PROSECUTOR, I AM ALSO MINDFUL OF THE IMPORTANCE OF ENSURING THAT VICTIMS OF CRIME BE TREATED WITH FAIRNESS, DIGNITY, AND RESPECT THROUGHOUT THE CRIMINAL JUSTICE SYSTEM AND THAT OUR SYSTEM FINALLY RECOGNIZES CERTAIN BASIC RIGHTS POSSESSED BY ALL VICTIMS OF CRIME.

I SUBMIT TO YOU THAT, AFTER CAREFUL CONSIDERATION AND DEBATE, AN AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH WOULD ENSURE THAT VICTIMS OF CRIME CAN PARTICIPATE AND HAVE THEIR VOICES HEARD IN A COURT OF LAW, IS BOTH APPROPRIATE, ESSENTIAL, AND MOST IMPORTANTLY, JUST.

IN RHODE ISLAND, OUR CONSTITUTION SPECIFICALLY PROVIDES THAT THE GOVERNMENT OF OUR STATE HAS BEEN ESTABLISHED FOR "THE PROTECTION, SAFETY, AND HAPPINESS OF THE PEOPLE" (R.I. Const. Art. I, sec. 2). MOREOVER, ON AT LEAST FOUR OCCASSIONS THE NATIONAL ASSOCIATION OF ATTORNEY GENERAL HAS ADOPTED RESOLUTIONS FORMERLY RECOGNIZING CRIME

VICTIMS RIGHTS. THE DECLARATION OF RIGHTS CONTAINED WITHIN THE RHODE ISLAND CONSTITUTION FURTHER PROVIDES THAT VICTIMS HAVE A CONSTITUTIONAL RIGHT TO BE TREATED "WITH DIGNITY, RESPECT, AND SENSITIVITY DURING ALL PHASES OF THE CRIMINAL JUSTICE PROCESS" (R.I. Const. Art. I, sec. 23). FURTHERMORE, THE RHODE ISLAND CONSTITUTION PROVIDES THAT THESE RIGHTS SHOULD BE INCLUDED AMONG THOSE THAT WOULD CONSTITUTE THE "PARAMOUNT OBLIGATION IN ALL LEGISLATIVE, JUDICIAL AND EXECUTIVE PROCEEDINGS" (R.I. Const. preamble).

RHODE ISLAND GENERAL LAWS ALSO CONTAINS A "VICTIMS BILL OF RIGHTS" WHICH IMPLEMENT IN STATUTORY FORM THE CONSTITUTIONAL PRINCIPLES REFERENCED EARLIER.

IT IS IMPORTANT TO NOTE THAT IN RHODE ISLAND THE ATTORNEY GENERAL'S OFFICE PROSECUTES ALL FELONY CASES, MUCH LIKE DISTRICT ATTORNEYS DO IN MOST OTHER STATES. AND AS A CRIMINAL PROSECUTOR IN RHODE ISLAND SINCE 1979, I HAVE PERSONALLY PROSECUTED THE MOST HEINOUS OF CRIMES AND CONVICTED THE MOST VIOLENT OF DEFENDANTS, AND I THEREFORE CAN SAY THAT

IT IS NOT ONLY MY PERSONAL VIEW BUT MY PROFESSIONAL EXPERIENCE THAT HAVING VICTIMS PARTICIPATING AND INVOLVED AT EACH STAGE OF THE JUDICIAL PROCESS HELPS PROSECUTORS DO A BETTER JOB FROM ARREST THROUGH PAROLE.

FROM MY PERSPECTIVE, THE BOTTOM LINE IS THAT JUSTICE MUST BE DONE IN ALL CASES SO THAT THE SYSTEM YIELDS A RESULT THAT IS FAIR TO BOTH THE DEFENDANT AND THE PEOPLE OF THE STATE. PART OF THAT PROCESS SHOULD INCLUDE THE VOICE OF THE VICTIM.

WE'RE NOT TALKING ABOUT SPECIAL RIGHTS FOR A SPECIAL CLASS -- IN 1995, 1 IN 7 AMERICANS WERE VICTIMS OF CRIME. THAT'S 43 MILLION OF OUR PARENTS AND OUR CHILDREN, OUR BROTHERS AND OUR SISTERS, OUR NEIGHBORS AND OUR CO-WORKERS. THESE ARE THE PEOPLE WE SEE DAY AND NIGHT IN OUR SHELTERS AND OUR HOSPITALS, IN OUR CLINICS AND OUR DOCTORS' OFFICES, AND IN OUR POLICE STATIONS AND OUR COURTHOUSES.

WE KNOW ALL TOO WELL THAT AFTER THE CRIME IS COMMITTED, VICTIMS MAY ENCOUNTER MANY MENTAL, PHYSICAL, AND ECONOMIC CHALLENGES. AS A PROSECUTOR AND AN ELECTED OFFICIAL, IT IS MY JOB TO MAKE THEM FEEL A LITTLE LESS UNEASY, A LITTLE LESS FRIGHTENED, MORE INFORMED, AND MORE UNDERSTANDING OF WHAT THEY MAY ENCOUNTER AS A VICTIM.

IN THE RHODE ISLAND ATTORNEY GENERAL'S OFFICE, OUR VICTIM-WITNESS UNIT SEES FIRST HAND THE TOLL OF CRIME - UPON WOMEN, UPON CHILDREN, UPON THE ELDERLY, UPON BUSINESSES.

AND WE PROSECUTE SEXUAL OFFENDERS; DOMESTIC ABUSERS; GANG AND JUVENILE VIOLENCE; RECKLESS DRIVING AND DRIVING UNDER THE INFLUENCE; BURGLARY, ROBBERY, & THEFT...AND EACH YEAR, WE WORK WITH THE THOUSANDS OF VICTIMS WHO AREN'T IN THE HEADLINES, BUT WHO STILL NEED THE RIGHTS AND GUARANTEES TO JUSTICE THAT THIS CONSTITUTIONAL AMENDMENT WOULD PROVIDE.

I BELIEVE THE CONSTITUTIONAL AMENDMENT IN RI AND THE "VICTIMS BILL OF RIGHTS" STATUTE HAS WORKED WELL AND HAS MADE OUR COURT SYSTEM BOTH MORE ACCOUNTABLE AND MORE RESPECTED BY OUR CITIZENS.

VICTIMS AND THEIR LOVED ONES COME TO OUR COURTS KNOWING THAT NOTHING CAN CHANGE OR UNDO THE CRIME THAT HAS BEEN COMMITTED -- WHEN A LIFE HAS BEEN TAKEN THERE IS NOTHING WE CAN DO TO BRING IT BACK AND WHEN A CHILD'S INNOCENCE HAS BEEN LOST BECAUSE OF A MOLESTER, THE LIFELONG DAMAGE IS NOT ERASED BY A TRIAL OR A CONVICTION. BUT IN OUR PURSUIT OF JUSTICE WE CAN AND WE MUST WORK TO ENSURE THAT VICTIMS HAVE RESPECT FOR AND CONFIDENCE IN OUR JUDICIAL SYSTEM. WE MUST CONTINUE TO WORK TO ENSURE THAT OUR SYSTEM OF LAW AND JUSTICE IS RESPECTED. THE WORDS OF GEORGE WASHINGTON ARE AS TRUE TODAY AS WHEN THEY WERE ARTICULATED MORE THAN 200 YEARS AGO: "THE ADMINISTRATION OF JUSTICE IS THE FIRMEST PILLAR OF GOVERNMENT."

I HAVE WORKED WITH HUNDREDS OF VICTIMS OF CRIME. I HAVE EXPLAINED OUR CRIMINAL JUSTICE SYSTEM TO PARENTS GRIEVING OVER THE LOSS OF A CHILD. I HAVE WITNESSED THE COURAGE OF THE WOMEN BRUTALIZED BY SEXUAL ASSAULT, OR SMALL CHILDREN SCARRED BY CHILD MOLESTATION. IMAGINE THE PERSONAL STRENGTH THAT IT TAKES FOR THESE VICTIMS TO COME FORWARD, TO

TALK TO THE POLICE, TO SUBMIT TO CROSS-EXAMINATION, AND TO REVEAL THE MOST PRIVATE AND DEGRADING FACTS IN AN OPEN COURTROOM. OFTEN WE HAVE TO EXPLAIN TO THEM THE PROCEDURES THAT WE HAVE IN PLACE TO PROTECT THE RIGHTS OF THE ACCUSED. AND SOME OF THESE VICTIMS MUST WONDER, "WHAT ABOUT MY RIGHTS?" WHATEVER WORDS THEY USE, HOWEVER THEY ARTICULATE IT, WHAT THEY ARE REALLY LOOKING FOR FROM OUR CRIMINAL SYSTEM IS ONE THING -- JUSTICE. I HAVE PERSONALLY SHARED THE SATISFACTION THAT VICTIMS FEEL WHEN THE JURY IN THEIR CASE CONVICTS THE ACCUSED. THESE VICTIMS WALK OUT OF THE COURTROOM WITH A SENSE THAT SOMEONE CARED ABOUT THEIR SUFFERING, THAT SOMEONE BELIEVED THEIR ACCOUNT OF THE FACTS, AND THAT SOCIETY HAS GIVEN THEM AN OUTLET TO REDRESS THE WRONG THAT WAS DONE TO THEM.

FORTUNATELY, IN RHODE ISLAND, AS I MENTIONED EARLIER, WE HAVE A CONSTITUTIONAL PROVISION THAT RECOGNIZES VICTIMS' RIGHTS, AND WE HAVE A STATUTORY VICTIMS' BILL OF RIGHTS THAT GIVES REAL MEANING TO THESE CONSTITUTIONAL PROTECTIONS.

SOME CRITICS MIGHT SAY THAT ADOPTING SUCH AN AMENDMENT TRIVIALIZES THE CONSTITUTION. I DISAGREE WITH THAT NOTION, AND I THINK THAT THE VALUE OF SUCH CONSTITUTIONAL PROVISIONS IS ILLUSTRATED BY THE MANY VICTIMS WHO MAKE USE OF THEIR RIGHT TO ADDRESS THE COURT AT SENTENCING. THIS CONSTITUTIONAL RIGHT GIVES THE VICTIM AN OFFICIAL FORUM IN WHICH TO STAND FACE TO FACE WITH THE DEFENDANT AND ASK THE SENTENCING JUDGE TO HOLD THE DEFENDANT ACCOUNTABLE FOR THE HARM THAT THE VICTIM SUFFERED.

IN MY LONG EXPERIENCE AS A PROSECUTOR, I HAVE SEEN THE EMPOWERING EFFECT THAT THIS HAS ON VICTIMS, AND I THINK RECOGNIZING THE UNIQUE STATUS OF VICTIMS IN OUR CONSTITUTION IS AN IMPORTANT PART OF ASSURING THAT BOTH OUR STATE AND FEDERAL JUDICIAL SYSTEMS DELIVER ON THE PROMISE OF JUSTICE.

AS JAMES MADISON WROTE IN FEDERALIST 51: "JUSTICE IS THE END OF GOVERNMENT. IT IS THE END OF CIVIL SOCIETY. IT EVER HAS BEEN AND EVER WILL BE PURSUED UNTIL IT BE OBTAINED..." THIS QUEST FOR JUSTICE IS AT THE VERY HEART OF OUR CONSTITUTIONAL FORM OF GOVERNMENT. RECOGNIZING THE RIGHTS OF VICTIMS CAN ONLY FURTHER THIS GREAT PURSUIT.

I AM GENERALLY RELUCTANT TO AMENDING OUR CONSTITUTION. BUT WITH APPROPRIATE DISCUSSION, INTELLIGENT DEBATE, AND CAREFUL CONSIDERATION, I BELIEVE THAT THE VICTIMS OF CRIME ARE ENTITLED TO A CODIFICATION OF THEIR RIGHTS.

ANY MEANINGFUL CONSTITUTIONAL AMENDMENT MUST PROVIDE VICTIMS WITH AN UNAMBIGIOUS GUARANTEE THAT THEY MAY PARTICIPATE IN THAT PROCESS. THIS AMENDMENT SHOULD CODIFY THE RIGHTS THAT WE SHOULD GUARANTEE VICTIMS, THE SAME WAY OUR CONSTITUTION GUARANTEES THE RIGHTS OF DEFENDANTS. FURTHERMORE, A CAREFULLY DESIGNED AMENDMENT WOULD COMPLEMENT SUCCESSFUL AMENDMENTS AND STATUTES ALREADY IN PLACE IN MANY STATES, AND WHICH ARE UNDER CONSIDERATION IN MANY OTHERS.

I WOULD LIKE TO SUBMIT FOR YOUR REVIEW THE RESOLUTION ADOPTED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL AT OUR SUMMER MEETING HELD LAST MONTH IN ST. LOUIS WHICH DEMONSTRATES OUR SUPPORT FOR THE NEED FOR ENHANCED VICTIM PARTICIPATION IN AND ACCESS TO THE CRIMINAL JUSTICE SYSTEM.

ALTHOUGH THE ASSOCIATION TOOK NO FORMAL POSITION ON THE MERITS OF A CONSTITUTIONAL AMENDMENT RECOGNIZING CRIME VICTIMS' RIGHTS, I HAVE SPOKEN WITH MANY OF MY COLLEAGUES WHO STRONGLY SUPPORT THE CONCEPT OF SUCH AN AMENDMENT.

TO THE EXTENT THAT THEY HAVE ARTICULATED ANY RESERVATIONS ABOUT SUCH A MEASURE, THEIR POTENTIAL CONCERNS TYPICALLY FALL INTO THREE CATEGORIES. FIRST, THEY ARE CONCERNED THAT ANY AMENDMENT NOT CREATE A PRIVATE RIGHT OF ACTION FOR DAMAGES AGAINST ANY PROSECUTOR OR OTHER STATE OR LOCAL OFFICIAL WHO MAKES A GOOD-FAITH ATTEMPT TO COMPLY WITH ITS PROVISIONS. SECOND, THEY ARE CONCERNED THAT ANY AMENDMENT NOT GIVE VICTIMS ABSOLUTE VETO POWER OVER DISCRETIONARY DECISIONS TYPICALLY LEFT TO LAW ENFORCEMENT AND PROSECUTORS, SUCH AS CHARGING AND SENTENCING RECOMMENDATIONS. THIRD, THEY ARE CONCERNED ABOUT THE EFFECT OF ANY FEDERAL CONSTITUTIONAL AMENDMENT ON STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AFFORDING VICTIMS CERTAIN RIGHTS IN THEIR STATE CRIMINAL JUSTICE SYSTEM. TO THAT END, THE ASSOCIATION HAS

APPOINTED A WORKING GROUP CHAIRED BY MISSOURI ATTORNEY GENERAL JAY NIXON TO ANALYZE THESE AND OTHER ISSUES. WE LOOK FORWARD TO SHARING THAT ANALYSIS WITH YOU. SPEAKING ONLY AS THE RHODE ISLAND ATTORNEY GENERAL, I AM CONFIDENT THAT A MEANINGFUL AMENDMENT CAN BE DRAFTED TO ADDRESS THESE CONCERNS AND LOOK FORWARD TO WORKING WITH YOU TO DO JUST THAT.

THANK YOU ONCE AGAIN FOR THE OPPORTUNITY TO SPEAK HERE TODAY TO SUPPORT THE NEED FOR ENHANCED VICTIM PARTICIPATION IN THE CRIMINAL JUSTICE SYSTEM. I WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE. THANK YOU.

* * * *

attachments:

Excerpts from the Rhode Island Constitution,
Excerpts from Rhode Island General Laws,
Resolution of the National Association Of Attorneys General:
*Supporting the need for enhanced victim in and access to the criminal justice system,
Biography of Rhode Island Attorney General Jeffrey B. Pine.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting
June 9-12, 1996
St. Louis, Missouri

RESOLUTION

SUPPORTING THE NEED FOR ENHANCED VICTIM PARTICIPATION IN AND ACCESS TO THE CRIMINAL JUSTICE SYSTEM

WHEREAS, millions of people and households in the United States are victimized by crime each year; and

WHEREAS, many victims and their survivors face substantial financial loss, physical injury, emotional trauma and significantly reduced quality of life; and

WHEREAS, family members and friends of victims and survivors of crime also suffer from similar trauma; and

WHEREAS, victims have a right to be treated with dignity, respect, courtesy, and sensitivity and the criminal justice system still fails to provide too many victims with meaningful access and participation; and

WHEREAS, twenty states already have amended their constitutions to provide for the rights of victims in their state criminal justice process; and

WHEREAS, a similar number of states currently have statutory provisions affording crime victims certain rights in the criminal justice system; and

WHEREAS, Congress recently passed legislation making restitution mandatory in all federal criminal cases; and

WHEREAS, a number of states have similar laws requiring orders of restitution in criminal cases; and

WHEREAS, the National Association of Attorneys General has supported victims of crime legislation since at least 1979; and

WHEREAS, a proposed Victims' Rights Constitutional Amendment was recently introduced in both Houses of Congress; and

WHEREAS, the decision to amend the United States Constitution is a decision of the utmost importance which cannot be taken without due regard for established principles of federalism and for the hard won protections victims of crime now enjoy under state law; and

WHEREAS, questions have been raised about the impact of the proposed Amendment on state criminal and juvenile justice systems;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Reaffirms its commitment to support victims' rights through support for appropriate constitutional amendments in states, commonwealths, and territories that do not have such an amendment;

2. Reaffirms its commitment to support enactment of a meaningful statutory Victims' Bill of Rights in states, commonwealths, and territories that do not already have such a statute;

3. Authorizes NAAG to establish a working group to: (a) study and develop an understanding and analysis of the proposed constitutional amendment , its impact upon the states and the necessity of the proposed amendment; (b) work cooperatively with the Congress, the U.S. Department of Justice, the National District Attorneys Association, victims' rights groups and other interested groups or organizations as necessary to accomplish its goals; and (c) if it is determined that a constitutional amendment is necessary, suggest any recommended modifications to the proposed amendment; and

4. Authorizes the Executive Director of the Association to transmit the resolution to all appropriate entities.

CONSTITUTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PREAMBLE

WE, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same, unimpaired, to succeeding generations, do ordain and establish this Constitution of government.

ARTICLE I.

Declaration of Certain Constitutional Rights and Principles.

In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare that the essential and unquestionable rights and principles hereinafter mentioned shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.

SECTION 1. In the words of the Father of his Country, we declare that "the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

SEC. 2. All free governments are instituted for the protection, safety, and happiness of the people. All the laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No

otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.

SEC. 3. Whereas Almighty God hath created the mind free; and all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness; and whereas a principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concernments; we, therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract; nor enforced, restrained, molested, or burdened in body or goods; nor disqualified from holding any office; nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.

SEC. 4. Slavery shall not be permitted in this state.

SEC. 5. Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.

SEC. 6. The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.

SEC. 7. Except in cases of impeachment, or in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, no person shall be held to answer for any offense which is punishable by death or by imprisonment for life unless on presentment or indictment by a grand jury, and no person shall be held to answer for any other felony unless on presentment or indictment by a grand jury or on information in writing signed by the attorney-general or one of the attorney-general's designated assistants, as the general assembly may provide and in accordance with procedures enacted by the general assembly. The general assembly may authorize the impaneling of grand juries with authority to indict for offenses committed any place within the state and it may provide that more than one grand jury may sit simultaneously within a county. No person shall be subject for the same offense to be twice put in jeopardy. Nothing contained in this article shall be construed as in anywise impairing the inherent common law powers of the grand jury.

SEC. 8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and all punishments ought to be proportioned to the offense.

SEC. 9. All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life, or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of such an offense or already convicted of an offense punishable by imprisonment for life, or for an offense involving the unlawful sale, distribution, manufacture, delivery, or possession with intent to manufacture, sell, distribute or deliver any controlled substance or by possession of a controlled substance punishable by imprisonment for ten (10) years or more, when the proof of guilt is evident or the presumption great. Nothing in this section shall be construed to confer a right to bail, pending appeal of a conviction. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety shall require it; nor ever without the authority of the general assembly. (Amendment Adopted November 8, 1988).

SEC. 10. In all criminal prosecutions, accused persons shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against them, to have compulsory

process for obtaining them in their favor, to have the assistance of counsel in their defense, and shall be at liberty to speak for themselves; nor shall they be deprived of life, liberty, or property, unless by the judgement of their peers, or by the law of the land.

SEC. 11. The person of a debtor, when there is not strong presumption of fraud, ought not to be continued in prison, after such person shall have delivered up property for the benefit of said person's creditors, in such manor as shall be prescribed by law.

SEC. 12. No *ex post facto* law, or law impairing the obligation of contracts, shall be passed.

SEC. 13. No person in a court of common law shall be compelled to give self-incriminating evidence.

SEC. 14. Every person being presumed innocent, until pronounced guilty by law, no act of severity which is not necessary to secure an accused person shall be permitted.

SEC. 15. The right of trial by jury shall remain inviolate. In civil cases the general assembly may fix the size of the petit jury at less than twelve but not less than six.

SEC. 16. Private property shall not be taken for public uses, without just compensation. The powers of the state and of its municipalities to regulate and control the use of land and waters in furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.

SEC. 17. The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to Fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and

passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

SEC 18. The military shall be held in strict subordination to the civil authority. And the law martial shall be used and exercised in such cases only as occasion shall necessarily require.

SEC. 19. No soldier shall be quartered in any house in time of peace, without the consent of the owner; nor, in time of war, but in manner to be prescribed by law.

SEC. 20. The liberty of the press being essential to the security of freedom in a state, any person may publish sentiments on any subject, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged.

SEC. 21. The citizens have a right in a peaceable manner to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or for other purposes, by petition, address, or remonstrance. No law abridging the freedom of speech shall be enacted.

SEC. 22. The right of the people to keep and bear arms shall not be infringed.

SEC. 23. A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of

the crime, and shall receive such other compensation as the state may provide. Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim.

SEC. 24. The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people. The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States.

GENERAL LAWS
OF
RHODE ISLAND

1956

Reenactment of 1994

Completely Annotated

VOLUME 3

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1994

GENERAL LAWS
OF
RHODE ISLAND

CHAPTER 28
VICTIM'S RIGHTS

12-28-1. Short title. — This chapter may be cited as the "Victim's Bill of Rights".

History of Section.
P.L. 1983, ch. 265, § 1.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) substituted the present chapter heading for "Rights of the Victim", and substituted the present section heading for "Title".

12-28-2. Legislative purpose. — In recognition of the responsibility of the community to the victims of crime, the general assembly declares its intent to ensure:

(1) That all crime victims are treated with dignity, respect, and sensitivity at all phases of the criminal justice process;

(2) That whenever possible they receive financial compensation for their injury or loss from the perpetrator of the crime; and

(3) That the full impact of the crime upon the victim is brought to the attention of the court.

History of Section.
P.L. 1983, ch. 265, § 1.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) substituted "crime victims" for "such victims" in subdivision (1) and made stylistic and minor punctuation changes throughout the section.

12-28-3. General rights. — (a) Each victim of a criminal offense who makes a timely report of the crime and who cooperates with law enforcement authorities in the investigation and prosecution thereof shall have the following rights:

(1) To be notified no less frequently than every three (3) months by law enforcement authorities of the status of the investigation, until such time as the alleged perpetrator is apprehended or the investigation closed.

In the case of a criminal offense that results in the victim's death the law enforcement authorities shall provide notification to a designated family member of the victim;

(2) To be notified by law enforcement authorities of the arraignment of the alleged perpetrator before a court empowered to set bail; and to be informed of the release of the alleged perpetrator on bail or personal recognizance;

(3) To receive protection from harm and threats of harm arising out of the victim's cooperation with law enforcement and prosecution efforts, and to be provided with information as to the means of protection available;

(4) To be notified of all court proceedings at which the victim's presence is required in a reasonable amount of time prior to the proceeding, and to be notified of the cancellation of any scheduled court proceeding in sufficient time to prevent an unnecessary appearance at the courthouse;

(5) To be provided, whenever feasible, with a secure waiting area during court proceedings that does not require the victim to be in close proximity to the defendant and the family and friends of the defendant;

(6) To be informed of the procedure to be followed in order to apply for and receive any witness fee to which the victim is entitled;

(7) To be provided with appropriate employer intercession services to ensure that the employer of the victim will cooperate with the criminal justice process in order to minimize the employee's loss of pay and other benefits resulting from court appearances;

(8) To have any stolen or other personal property expeditiously returned by law enforcement agencies when no longer needed as evidence;

(9) To be informed of financial assistance and other social services available to crime victims and the manner of applying therefor. All eligible victims shall be informed of the existence of the criminal injuries compensation fund and the manner of applying therefor;

(10) To be consulted by the administrator of probation and parole in the course of his or her preparation of the presentence report on felony cases and to have included in that report a statement regarding the impact which the defendant's criminal conduct has had upon the victim;

(11) To be afforded the right to address the court prior to sentencing in those cases where the defendant has been adjudicated guilty following a trial;

(12) To be informed of the disposition of the case against the alleged offender;

(13) To be notified in felony cases whenever the defendant or perpetrator is released from custody. When release is ordered prior to final conviction, notice to the victim shall be given by the attorney general. When release is granted subsequent to final conviction, said notice to the victim shall be given by the parole board; and

(14) To be afforded the opportunity to make a statement, in writing and signed, regarding the impact which the defendant's criminal conduct had upon the victim. The statement shall be inserted into the case file maintained by the attorney general or prosecutor and shall be presented to the court for its review prior to the acceptance of any plea negotiation. Said statement shall be submitted to the parole board for inclusion in its records regarding the defendant's conduct against the victim.

(15) To be informed by the prosecuting officer of the right to request that restitution be an element of the final disposition of a case.

(b) The rights afforded to the victim of a crime by this section shall be afforded as well to the immediate families of homicide victims.

(c) Unless otherwise specified, in felony cases it shall be the responsibility of the attorney general and the victims' services unit, as described in § 12-28-10 to make certain that the victim receives such notification as is required by this section. In misdemeanor cases, it shall be the responsibility of the law enforcement agency making the arrest and of the victims' service unit, as described in § 12-28-10 to make certain that the victim receives such notification as is required by this section.

History of Section.
P.L. 1983, ch. 265, § 1; P.L. 1985, ch. 411, § 1; P.L. 1986, ch. 405, § 1; P.L. 1988, ch. 129, art. 25, § 5; P.L. 1988, ch. 444, § 2; P.L. 1991, ch. 302, § 1; P.L. 1994, ch. 187, § 1.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) substituted the present section heading for "Rights of the victim during investigation and prosecution of the crime", added the subsection designa-

tions, and made stylistic and minor punctuation changes along with several substitutions for "said" throughout the section.

Compiler's Notes. This section as it appears above has been edited by the compiler to incorporate the changes made by the 1994 reenactment of title 12 by P.L. 1994, ch. 134, which were not included in the 1994 amendment. For the extent of the reenactment changes, see the reenactment note above.

12-28-4. Right to address court prior to sentencing. — (a) Prior to the imposition of sentence upon a defendant who has been adjudicated guilty of a crime in a trial, the victim of the criminal offense shall be afforded the opportunity to address the court regarding the impact which the defendant's criminal conduct has had upon the victim. The victim shall be permitted to speak prior to counsel for the state and the defendant making their sentencing recommendations to the court and prior to the defendant's exercise of his or her right to address the court.

(b) For the purposes of this section, a "victim" is one who has sustained personal injury or loss of property directly attributable to the felonious conduct of which the defendant has been convicted. In homicide cases, a member of the immediate family of the victim shall be afforded the right created by this section.

History of Section.

P.L. 1983, ch. 265, § 1; P.L. 1985, ch. 411, § 1; P.L. 1986, ch. 405, § 1; P.L. 1988, ch. 444, § 2.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) deleted "Victim's" from the beginning of the section heading, added the subsection designations, substituted "the criminal" for "said criminal" near the beginning of subsection (a), and inserted quotation marks surrounding "victim" in subsection (b).

12-28-4.1. Right to address court regarding plea negotiation. — (a) Prior to acceptance by the court of a plea negotiation and imposition of sentence upon a defendant who has pleaded nolo contendere or guilty to a crime, the victim of the criminal offense shall, upon request, be afforded the opportunity to address the court regarding the impact which the defendant's criminal conduct has had upon the victim. The victim shall be permitted to speak prior to counsel for the state and the defendant making their sentencing recommendations to the court and prior to the defendant's exercise of his or her right to address the court.

(b) For the purposes of this section, a "victim" is one who has sustained personal injury or loss of property directly attributable to the criminal conduct of which the defendant has been charged. In homicide cases, a member of the immediate family of the victim shall be afforded the right created by this section.

History of Section.

P.L. 1985, ch. 387, § 1; P.L. 1986, ch. 405, § 1; P.L. 1988, ch. 444, § 2.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) deleted "Victim's" from the beginning of the section heading, added the subsection designations, substituted "and the imposition" for "and imposition" and "the criminal" for "said criminal" near the beginning of subsection (a), inserted a comma following "shall" and "request" near the middle of subsection (a), and inserted quotation marks surrounding "victim" in subsection (b).

12-28-4.2. Representative of incapacitated victim. — A member of the immediate family of a victim who is unable to exercise the rights established by this chapter personally, due to physically incapacity resulting from the crime, shall, upon request, be afforded the opportunity to exercise those rights on the victim's behalf.

History of Section.
P.L. 1985, ch. 387, § 2.
Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) inserted a comma following "personally" and "crime" near the middle of the section, and substituted those rights" for "said rights" near the end of the section.

12-28-4.3. Pretrial conferences — Misdemeanors in district court. — (a) In all misdemeanor cases heard before the district court, the victim of the alleged criminal offense shall be afforded the opportunity to address the court during the pretrial conference, unless the judge determines, based on the facts of the particular case, that the presence of the victim would substantially interfere with the court's ability to administer justice. At the pretrial conference, the victim shall be afforded the opportunity to explain the impact which the defendant's criminal conduct has had upon the victim and to comment on the proposed disposition of the case.

(b) For the purposes of this section, a "victim" is one who has sustained personal injury or loss of property directly attributable to the criminal conduct with which the defendant has been charged.

History of Section.
P.L. 1986, ch. 405, § 2.
Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) added the subsection designations, substituted "the pretrial" for "said pretrial" and "the case" for "said case" in the second sentence of subsection (a), and inserted quotation marks surrounding "victim" in subsection (b).

12-28-5. Civil judgment against defendant. — (a) Upon his or her final conviction of a felony after a trial by jury, a civil judgment shall automatically be entered by the trial court against the defendant conclusively establishing his or her liability to the victim for such personal injury and/or loss of property as was sustained by the victim as a direct and proximate cause of the felonious conduct of which the defendant has been convicted. The court shall notify the victim at his or her last known address of the entry of the civil judgment in his or her favor and inform him or her that he or she must establish proof of damages in an appropriate judicial proceeding in order to recover for his or her injury or loss. This section shall not apply to crimes set forth in title 31 arising from the operation of a motor vehicle.

(b) For the purposes of this section, a "victim" is one who has sustained personal injury or loss of property directly attributable to the felonious conduct of which the defendant has been convicted. In homicide cases, judgment shall enter for the benefit of those parties eligible to commence a wrongful death action pursuant to chapter 7 of title 10.

History of Section.
P.L. 1983, ch. 265, § 1; P.L. 1988, ch. 444, § 2.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) added the subsection designations and inserted quotation marks surrounding "victim" in subsection (b).

NOTES TO DECISIONS

1. Punitive Damages.
An award of punitive damages does not fall within the ambit of this section. Trainor v. Town of N. Kingstown, Sup. Ct. Op. No. 92-281-Appeal (WC 85-440). — A.2d — (R.I. 1993).

12-28-5.1. Restitution. — When the court orders a defendant to make financial restitution to the victim of a crime of which the defendant has been convicted or to which the defendant has pleaded guilty or nolo contendere, a civil judgement shall automatically be entered by the trial court against the defendant on behalf of the victim for that amount. If payment is not made by the defendant within the period set by the court, the civil judgement for the amount of the restitution ordered, plus interest at the statutory amount from the date of the offense, plus costs of suit, including reasonable attorney's fees, shall be enforceable by any and all means presently available in law for the collection of delinquent judgments in civil cases generally.

History of Section.
P.L. 1986, ch. 405, § 2.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) corrected a misspelling of "enforceable" near the end of the section, which correction was first made by the compiler in 1986, inserted a comma following "suit" in the second sentence, and made several substitutions for "said" throughout the section.

12-28-6. Right to address parole board. — (a) Prior to acting upon the petition or any continuance thereof of an inmate at the adult correctional institution or the women's reformatory, the parole board shall notify the victim, if he or she is identified and his or her residence is known, of the criminal conduct for which the inmate has been incarcerated of the pendency of the proceedings before the board. The victim shall upon request be afforded the opportunity to address the board regarding the impact of the crime upon the victim.

(b) Should the parole board be unable to locate the victim, the board shall seek the assistance of the local police department of the city or town where the victim was last known to have resided. The police department shall make every effort to locate the victim and shall, no later than thirty (30) days from the date its assistance was sought, send a written report to the parole board detailing its efforts to locate said victim.

(c) Whenever the parole board shall seek the assistance of any police department in locating a victim, the board shall not act upon the inmate's petition until it has reviewed the written report from the assisting police department.

(d) For the purposes of this section, a "victim" is one who has sustained personal injury or loss of property directly attributable to the criminal conduct for which the inmate has been incarcerated. In

homicide cases, a member of the immediate family of the victim shall be afforded the right created by this section.

History of Section.
P.L. 1983, ch. 265, § 1; P.L. 1985, ch. 411, § 1; P.L. 1989, ch. 419, § 2.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) deleted "Victim's" from the beginning of the section heading, added the subsection designations, substituted "if he or she is" for "if any be" and "is known" for "be known" in subsection (a), inserted quotation marks surrounding "victim" in subsection (d), and made several substitutions for "said" throughout the section.

12-28-7. Noncompliance not affecting validity of conviction, sentence, or parole. — Failure to afford the victim of a felony offense any of the rights established by this chapter shall not constitute grounds for vacating an otherwise lawful conviction, or for voiding an otherwise lawful sentence or parole determination.

History of Section.
P.L. 1983, ch. 265, § 1.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) inserted a comma following "sentence" in the section heading.

12-28-8. Severability. — If any of the provisions of this chapter or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of the chapter are declared to be severable.

History of Section.
P.L. 1983, ch. 265, § 1.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) substituted "that invalidity" for "such invalidity" near the middle of the section.

12-28-9. Child victims. — The general assembly finds that it is necessary to provide child victims and witnesses in family, district or superior court with special consideration and treatment beyond that usually afforded to adults. It is the intent of this section to provide these children with additional rights and protection during their involvement with the criminal justice system. As used in this section, a "child" is anyone who is less than fifteen (15) years of age. Child victims of felony offenses, or offenses which would be considered felony offenses if committed by adults, shall have the following rights in addition to those set forth elsewhere in this chapter:

(1) To have explanations, in language understandable to a child of the victim's age, of all investigative and judicial proceedings in which the child will be involved;

(2) To be accompanied at all investigative and judicial proceedings by a relative, guardian, or other person who will contribute to the child's sense of well being; unless it is determined by the party conducting the proceeding that the presence of the particular person would substantially impede the investigation or prosecution of the case;

(3) To have all investigative and judicial proceedings in which the child's participation is required arranged so as to minimize the time when the child must be present;

(4) To be permitted to testify at all judicial proceedings in the manner which will be least traumatic to the child, consistent with the rights of the defendant;

(5) To be provided information about and referrals to appropriate social service programs, to assist the child and the child's family in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.

History of Section.
P.L. 1985, ch. 411, § 2; P.L. 1993, ch. 413, § 1.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) corrected a misspelling of "proceeding" throughout the section, which changes were first made by the compiler in 1985, and made capitalization and minor punctuation changes throughout the section.

12-28-10. Victims' services unit. — (a) There is hereby created with the state court system a victims' services unit which shall be responsible for assisting victims of crimes adjudicated in the superior, family, and district courts in the exercise of their rights as set forth above, and it shall be administered by the state court administrator through the administrative office of the state courts. The state court administrator may in his or her discretion contract for any services to be provided to victims of crimes pursuant to this chapter or pursuant to § 12-25-12.2. Services provided to victims of crimes shall include, but not be limited to, the following:

(1) Identification of and outreach to victims to inform them of their rights and of the services available to them;

(2) Counseling and support, including referral to specialized counseling resources;

(3) Assistance in seeking return of property, restitution, and in filing claims for compensation under the violent crimes indemnity fund or under the criminal royalties fund;

(4) Assistance in preparing for and making court appearances and in making victim impact statements;

(5) Notification about the status of their cases in coordination with representatives of the attorney general or the relevant law enforcement agency; and

(6) Such other assistance as may further the rights of victims.

(b) In determining the allocation of resources available to implement this section, victims who have suffered personal injury and the immediate families of homicide victims shall be given priority over victims who have suffered only loss of property.

(c) The state court administrator shall report annually on the services provided through this unit.

681

History of Section.
P.L. 1986, ch. 405, § 2; P.L. 1988, ch. 129, art. 25, § 4; P.L. 1988, ch. 444, § 2.

Reenactments. The 1994 Reenactment (P.L. 1994, ch. 134, § 1) divided the section into subsections, corrected a misspelling of "homicide" in subsection (b), which correction was first made by the compiler in 1988, inserted a comma following "family" near the beginning of subsection (a), and substituted "the attorney general" for "the department of the attorney general" in subsection (a)(5).

Mr. HYDE. Thank you very much. Ms. Semel.

STATEMENT OF ELISABETH A. SEMEL, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Ms. SEMEL. Thank you, Mr. Chairman. Members of the committee, as I was reflecting this morning on the line-up of panels and my placement in what I suppose I would characterize as the lawyer's panel, a question came to my mind. Which panel should I be seated on? Should I be seated here with the lawyers, or should I be seated with the victims of crime?

The reason I ask that question is because I am an individual who lost her sister when my sister was 18 years of age, more than 20 years ago. I am an individual whose lifelong friend, another sister to me, was killed in a terrorist attack last year. It is very, very difficult for me as someone who has never in a public forum described myself as a survivor or of the family of a survivor, to do so today, but I do so for what I think is an important reason.

First of all, I had to ask myself, where would my sister be seated? Where would my dear friend be seated? To some degree, an answer to that question was provided in the law review article which is attached to my testimony. It is written by Prof. Lynne Henderson, who wrote this article which appears in the Stanford Law Review. Professor Henderson, in addition to being a law professor and a former public defender, is also a survivor of rape and a rape crisis counselor. She would be seated next to me today, along with my sister and my dear friend, and her article, which is attached to my testimony, is a critique of the constitutional proposals that are in front of you. She, as a survivor of rape, as I, as a member of a survivor's family, is very very critical of this proposed amendment.

One of the things that concerns me is that there is a "them" and "us" mentality that has arisen as a result of the victims' rights movement; A notion that unless one has experienced the extraordinary and excruciating pain of being a crime victim, that one does not have the moral authority to speak out in support of the Bill of Rights. So I am going to take the opportunity and use this first public forum and say that I do think I bring to the table in my years of experience as a criminal defense practitioner and in my personal experience, the appropriate quotient of moral authority.

Also, I want to remind you that among NACDL's 39,000 direct and affiliated members, there are hundreds whose families have been touched by crime, who have been personally victimized, whose commitment to and faith in the Bill of Rights has truly been tested, but who nonetheless feel that a constitutional amendment, a tampering with the Bill of Rights, is unwarranted.

Now there is of course—I hope there is no substitute for the written testimony that I have submitted, for the reason that it takes time to describe and define the problems with this proposal in a very specific way. In the final analysis, I would hope that the rationality and the reasoned thinking of that kind of an analysis would prevail over whichever witness or group of witnesses has the greatest emotional pitch in this room today.

I have heard crime victims complain and protest today and for many years that the system is imbalanced and needs to be put in balance. I would like to remind you that the system is deliberately

out of balance. The Bill of Rights is designed to protect individuals from Government power and nowhere is that Government power more dangerous than when it is brought to bear against an individual accused.

The presumption of innocence and the burden of proof are the linchpins of those protections. It is most threatening to the presumption of innocence and to the burden of proof when the crime victim, and the kind of entitlements that you have proposed, are injected into the system at the pretrial and trial stages.

The idea is that a defendant is merely an accused until convicted of a crime. By seating the alleged victim at the table at a bail hearing, at a trial proceeding, objecting to plea negotiations, we transform the accused into the convicted before the trial takes place. Because what we have done is said here is the victim, therefore, he the accused must be the victimizer. The participation of the victim at the pretrial and trial stages, as an advocate with rights coequal to those of the accused, threatens to deprive the accused of that presumption of innocence.

I just want to mention in my closing remarks that coming from California, I think it is no coincidence that I am sitting here before you today; because California is in essence, the originator of the crime victims' bill of rights. California is also the media capital of the United States. One of the phenomena that I have observed in that State is that the extraordinary has the capacity to become ordinary. That the enormously publicized case such as the killing of Polly Klaas becomes—we come to feel that it is ordinary. The risk we run is that in reaction to the extraordinary, we make sweeping systemic changes such as that proposed.

So let me say as I sit in front of what feels to me quite like a courtroom, in front of individuals who have very much the same responsibilities as jurors do, sworn to uphold the Constitution and the law, that you must listen to the evidence. What NACDL is proposing to you is that the evidence of the need for a Federal constitutional amendment is not before you.

This august body must take time to carefully study the experiments in those 20 States. Analyze and decide, not on the basis of a high profile case or the individual testimony of a crime victim. What is working and what is not? Have a GAO study. Take a look at the numbers and the functioning and the effectiveness of those State laws before deciding to embark upon this course, which will literally undermine the Bill of Rights.

As I said, I believe that my faith and confidence in the Bill of Rights was tested on the most personal of levels. I retain my commitment to it. I ask you to uphold yours.

[The prepared statement of Ms. Semel follows:]

Prepared Statement of Elisabeth A. Semel, on Behalf of the National Association of Criminal Defense Lawyers

Chairman Hyde and Members of the Committee:

Thank you for providing me this opportunity to testify on behalf of the members of the National Association of Criminal Defense Lawyers (NACDL) in opposition to H.J. 173 and H.J. 174.

The 9,000 direct and 30,000 state and local affiliated members of the National Association of Criminal Defense Lawyers are private defense attorneys, public defenders and law professors. They have devoted their lives to protecting the many provisions of the Bill of Rights concerned with fairness in the criminal justice system. NACDL's interest in, and special qualifications for understanding the grave dangers posed by H.J. 173 and H.J. 174 are keen. I am here today to explain why we stand in firm opposition to a "victims' rights" constitutional amendment.

My testimony begins with an observation: Although two criminal defense lawyers have been given a place at the table, those whose testimony you will hear today are almost exclusively proponents of the "victims' rights" amendment. The political currency of this movement at this time in our history appears to be gold. Indeed, it appears that those whose personal tragedies entitle them to wear the label "crime victim" have the ear of our law makers to the near-exclusion of experienced judges, defense lawyers and even prosecutors.

The rhetorical power of the phrase -- "victims' rights" -- is evocative of our cherished historical and traditional freedoms and, more currently, society's profound fears. Who could be "anti-victim"? Indeed, in today's culture, those supportive of the constitutional rights of the citizen accused are tarred as "anti-victim." This is apparently an intolerable position for many running for elected office.

Attached to this testimony is an insightful Stanford Law Review article by Professor Lynne

N. Henderson, herself a rape survivor and rape crisis counselor. She knows very well of what she speaks:

> [T]he symbolic manipulation of the victim successfully avoids a more serious debate about how the criminal justice process should be structured and disguises the truly revolutionary nature of the reforms proposed.[1]

But responsible legislators -- guardians of our constitutional tradition as well as the public purse -- are sworn to engage in reasoned and well-informed debate, and they owe it to the people to do so, including those who have been victims of crime.

Many proponents of this amendment insist that a "victims' rights" amendment will not "eliminate" defendants' rights.[2] Whether the correct verb choice is "destroy" or "dilute," such claims are disingenuous at best. The stated ambition of the movement is to see the rights of victims "elevated to the same status" as those of the accused.[3] By definition, this so nullifies the rights of the citizen accused as to effectively **write them out** of the Constitution. The purpose of a criminal trial is not the advocacy of the victim, who enjoys the tremendous sympathy of the community and whose painful story has indeed moved the enormous powers of the government against another, far less sympathetic citizen: The Accused. Rather, as University of Chicago Law and Criminology Professor Stephen J. Schulhofer teaches:

---

1 Lynne N. Henderson." The Wrongs of Victim's Rights," 37 Stanford Law Review 937, 952 (1985).

2 See e.g. Statement of Paul G. Cassell, Assoc. Prof. of Law, Univ. of Utah Coll. of Law, Before the Comm. on the Judiciary, United States Senate, Concerning the Victims' Bill of Rights Amendment, April 23, 1996, at 26.

3 Sen. John Kyl (R-Ariz.) quoted in "Victims' Ultimate Revenge," Legal Times, July 11, 1996, at 17.

> The purpose of the trial is to determine whether the defendant is factually and legally responsible for an offense. Indeed, the Supreme Court has sometimes implied that this truth-determining function should be virtually the **sole** task of the criminal trial. Presently, our society remains committed to a small number of devices that can sometimes interfere (mostly in modest ways) with the primary truth-seeking function of the trial. But we remain acutely aware of the costs of procedural rules that serve goals other than determining the truth, and we are rightfully suspicious of efforts to burden our trial process by adding more rules of that sort.
>
> ***
>
> Any thoroughgoing effort to reshape the criminal trial to serve the victim, at the expense of truth seeking, would have dramatic and totally unacceptable costs. [4]

A Government of the People, of Limited Powers

The core principle that runs through the Bill of Rights is that the federal government's power to act against the individual must be restrained. When the United States Constitution was ratified in 1789, it did not contain a citizen's Bill of Rights. But many of the states that ratified our Constitution did so **only** on the condition that additional protections against the power of government would be included as soon as possible. The first ten amendments to the Constitution -- our Bill of Rights -- limiting government power over the inalienable rights of the people, were accordingly prompted added in 1791, only four years after the Constitution was ratified.

"The Bill of Rights was designed to protect personal liberties from governmental infringement, not to protect private individuals from each other." [5] The Constitution is **not** the place for affirmative entitlement promises from the government, such as those contained in H.J. 173 and H.J. 174. The fact that several of the various states that have contracted to the Republic under the

---

4 Stephen J. Schulhofer, "The Trouble With Trials: The Trouble With Us," 105 Yale L.J. 825, 840-841 (emphasis in original; citations omitted).

5 James M. Dolliver, "Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come," 34 Wayne L. Rev. 87, n. 7, at 91 (1987).

federal constitution have seen fit to experiment with state constitutional amendments does not mean it is an appropriate amendment for the entire country's constitution. Such a reckless assumption sabotages the check and balance of federalism and thus further wreaks havoc upon our constitutional charter.

The rights between "victim" and citizen accused **are supposed to be** "imbalanced." There were crime victims in 1789 and 1791 too. But the Founders recognized that only if "imbalance" was built into the criminal justice process -- cloaking the accused with the presumption of innocence and placing the burden of proof on the prosecution -- could the government's power to act against the individual (no matter how sympathetic or well-intentioned) be fairly controlled. Inasmuch as the "victims' rights" amendment will undo this historic "imbalance," politicians who embrace this proposal must be ready to tell Americans why they want to sacrifice the people's protections under the Bill of Rights in the bargain.

Proposed Amendment Procedural Entitlements: Mob Rules?

We do not live in an absolute democracy, of absolute majority rule, where majorities bestow individual rights or deny them, unchecked, at popular will or whim. Rather, in America, even minorities are constitutionally recognized to have inalienable rights, secure from majority or mob domination. That is our constitutional heritage as Americans.

In today's climate of crime hysteria, the accused is the consummate minority. Particularly when charged with a crime of violence, he often faces the power of the government alone save for his defense counsel, whose resources are almost always a minuscule fraction of those increasingly appropriated to the accusatory government. Infusing "victims'" advocates, who already carry an

enormous cache of popular will, with constitutional might overwhelms the counter-majoritarian check reflected in the Constitution and the Bill of Rights, to the advantage of mob rule.

Lest anyone doubt the threat to rational, impartial justice (truth) posed by the inflammatory passions of unchecked victim advocacy, consider just two recent examples:

1. Last month, the conservative California Supreme Court unanimously held that the state's revolutionary "three strikes" statute, as enacted by the legislature and approved by the voters, still left judges with the limited power they have had since the state's founding in 1850, to dismiss prior convictions, "in the interests of justice," and thus exercise some discretion in sentencing. That court is composed of six Republican appointees and one Democrat. Indeed, the six Republicans all came to the court after Californians voted to unseat several justices whom "victims' rights" advocates accused of blocking executions. The California Supreme Court now affirms some 98 percent of death penalty judgments, more than any other court in the nation. Rather than accept what was a conservative, straight-forward analysis of the constitutional provision, Mike Reynolds, the crime victim/architect of "three strikes," quickly and publicly condemned the court for its refusal to follow in line with what he Kafkaesquely decreed was the popular will.[6] The California legislature is now making haste to "fix" the law to Mr. Reynolds' satisfaction.

2. Mark Klaas, the father of Polly Klaas, whose daughter's killing provided the necessary political impetus for the rapid-fire enactment of "three strikes," has become an omnipresent commentator on a gamut of criminal justice issues. The jury in the trial of Richard Allen Davis, the man charged with Polly's murder, had the initial task of deciding whether Davis was

---

[6] Press release from the Office of Bill Jones, California Secretary of State, June 20, 1996.

actually guilty of the offense, and, if so, whether the prosecution had proved four special circumstances, each of which, if found true, could lead to a death sentence for Davis. The jury took but a few days to discharge its sworn responsibility to consider the evidence with due deliberation, but that was not fast enough for Klaas. Soon after they had retired todeliberate, Marc Klaas went on national television to chastise these twelve citizens for "failing" to instantly bring in the verdict he demanded. What message is this advocate of "victims' rights" sending to future jurors? What is in store for them if a "victim" is dissatisfied with the result or even the speed with which a verdict is rendered? Shall not they themselves be condemned as subversive traitors of the "new authority" of victim passion?

Government leaders who cherish historic constitutional protections should be gravely concerned that the ferocious momentum of the "victims' rights" movement has drastically altered public perceptions to a degree that seriously threatens the fair trial rights of the citizen accused. For example, in 1991, a research survey, commissioned by the California State Bar to explore the attitudes towards civil liberties in the year of the Bicentennial, revealed that 42 percent of the respondents believed it was up to the defendant to prove his or her innocence at trial.

Public Prosecution or Private Vengeance?

Ours is a system of public, not private prosecution. In America, the government may, on behalf of the entire citizenry, seek to take away the life, liberty or property of one of its constituents, based upon the evidenced allegation that the individual has violated a public law aimed at protecting us all. The law in question may or may not involve an accusation of specific harm to another member of society -- now popularly referred to as the "victim" (e.g., drug offenses). But

fundamentally, the conflict in a criminal case is between the government (on behalf of the entire populous) and the citizen accused, not between two private individuals. By "emphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel, the victim's rights amendment represents a dangerous return to the private blood feud mentality."[7] In other words, mob rule.

The democratic professionalization of the prosecutorial function -- largely completed in the last 25 years -- would be substantially diminished if untrained laypersons suffering emotional trauma are allowed to second-guess and effectively dictate the policy decisions made by lawyers accountable to the public.[8] Prosecutors representing the state (and not solely the alleged or actual victim) should certainly be sensitive to (but not controlled by) the concerns of an alleged or actual crime victim. No statute nor constitutional amendment can transform an insensitive prosecutor into one who is sensitive. Such radical legal surgery gravely risks overrunning the prosecutor's legitimate and ethical responsibility to uphold the public trust by maintaining objectivity in making the charging decision, and when pursuing a criminal case through to conviction and sentence.

California Experience

The "victims rights" amendment creates the illusion that by constitutionalizing a series of entitlements, a host of grievances will be redressed. As a California criminal defense lawyer for

---

[7] Dolliver, supra note 5, at 90, n. 7.

[8] See e.g., ABA Standards of Criminal Justice: Prosecution Function and Defense Function, Standard 3-2.1 (Prosecution Authority to be Vested in a Public Official), at 19-20 (3rd Ed. 1993).

more than twenty years, I recall many occasions, particularly during the 1970's and early 1980's, when I had greater communication with alleged victims than did prosecutors. In my efforts to interview victim/witnesses I found, not infrequently, that I was the first, and sometimes the only, lawyer with whom they had contact. It was not uncommon for victim/witnesses to tell me that they felt uninformed and confused about the process and they were grateful when I advised them of upcoming court dates and the status of the case. I found that many alleged victims responded to my courtesy by agreeing to an interview and, on occasion, the relationship I formed assisted in reaching the most equitable resolution of the criminal case.

By the initiative process, California has enacted two constitutional amendments purporting to increase "victims' rights." The Crime Victims' Bill of Rights (Proposition Eight), passed by the voters in 1982, was among the first such measures adopted in the nation. Proposition 115, the Crime Victims' Justice Reform Act, was approved by the electorate in 1990. Now, it is the norm in California, particularly in a serious felony case, for prosecutors to develop what may be an **all-to-personal** bond with the complaining witnesses and their families. The good news is that there is a fairly routine mechanism by which victims are kept apprised of the progress of the prosecution. The bad news is that these individuals are routinely terrified to speak with "the other side." They are encouraged to see themselves as "belonging" to the prosecution and district attorneys frequently refer to them as "my victim." Indeed, prosecutors sometimes simply use the victims as a pretext by which to refuse a reasonable pre-trial disposition, by announcing to defense counsel that they cannot agree to a resolution of the case because "their victim" is opposed. Affording victims what is tantamount to a veto over plea negotiations, for example, is contrary to the public good, which must accommodate a host of important societal interests. It also interferes with the prosecutor's ethical

responsibilities, including the prohibition that he or she not pursue a criminal conviction which is not supported by the evidence (no matter how heavily bolstered by victim emotion).

More general data confirms what we know about the California experience. The data on the over-emphasis upon "victim participation" in plea bargaining, for instance, suggests that it is far from the panacea that its advocates would lead us to believe. For example, a study of criminal case settlement conferences found that those crime victims who particpated were, on average, no more satisfied by the process than those who did not.[9]

Forgotten Crime Victims: The Wrongfully Arrested, Prosecuted And/Or Convicted

It bears emphasis that whenever the government accuses an individual of crime, at stake is the conviction of an innocent person. It is already at least a weekly occurence to open our daily paper or tune into the evening news to learn of another man or woman released after dozens of years of wrongful incarceration -- finally freed because of the exposure of perjured testimony, the recantation of a jailhouse "confession," or the discovery through new technology (e.g., DNA) of exonerating evidence. Just last week, three men were released from Illinois' death row, having spent 18 years in prison for a double murder they did not commit. As one of the men, Kenneth Adams, rightly said: "'We are victims of this crime too.' . . . 'I want people to know that this could happen to anybody and that's a crime.'" [10]

---

[9] Anne M. Heinz and Wayne A. Kerstetter, "Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining," 13 Law and Society Review, 349, 363 (1979).

[10] A fourth individual, Verneal Jimerson, spent 11 years on death row before he was exonerated. Don Terry, "After 18 Years in Prison, 3 Are Cleared of Murders," N.Y. Times, July 3, 1996.

These are American tragedies. Do we really want to exaccerbate these all too frequent failures of our criminal justice system -- multiplying victims, out of a misguided sympathy for them? Do we want to return to the days of the Scotsboro Boys and Leo Frank? For instance, in the notorious Leo Frank case in 1915, an innocent Jewish man was denied a fair trial by a court and jury dominated by an anti-Semitic mob, inflammed by victim sympathies. He was lynched.

It should be obvious that the investment of crime victims who understandably have the least objectivity about the question of guilt with the central, effectively overriding voice in the judicial process is certain to multiply the number of criminal justice casualties. It unduly and dangerously **enhances** the risk of victimhood. It increases the danger of wrongful conviction. And it increases the danger of new crime victimization by actual perpetrators left unprosecuted by vice of the increased ease by which unfettered victim passion allows the first government target/accused to be convicted.

This great country of ours deserves a better brand of justice than Leo Frank, the Scotsboro Boys, Kenneth Adams and his recently exonerated co-convicted, and numerous other wrongfully convicted (victims) received. Adherence to the Founders' vision of our **constitutional** democracy ensures that better brand of justice.

Full Employment For Personal Injury Lawyers Act?

These amendment proposals are a personal injury lawyer's dream come true. They are rife with litigation-spawning ambiguity. And the ambiguity is un"fixable."

Start with the title, for example. Consider those whom the amendment is intended to benefit: crime victims. Proponents of the amendment would have this Committee believe that the use of the

word "victim" is self-defining. But even in providing for mandatory restitution to victims of offenses under the recently enacted Anti-Terrorism and Effective Death Penalty Act of 1996, Congress had to craft a highly specific statutory description of the term.[11] The proposed amendments, H.J. 173 and H.J. 174, contain no such qualifying language. Moreover, even if it **were** appropriate to engraft such highly specific terminology onto a constitutional amendment, the definition would still be inadequate for purposes of achieving the wholesale victim empowerment envisioned by the proposals.

Indeed, because the term "victim" would be the "key" to a litany of victim entitlements, there would be endless legal contests over claims of such status and for such entitlements. Thus, the first judicial issue in every case, standing (that is, who may legitimately stand before the court with a claim), will itself be a highly litigious battleground.

Who is a victim? **Which** victims count? While the amendment's supporters might disagree, many Americans would concur with Kenneth Adams's assertion that he and his two co-defendants who were released last week after losing 18 years of their lives to wrongful conviction and imprisonment are indeed victims. Their wrongful convictions and 18-year deprivation of liberty, were certainly **proximately caused** by the original crime commission and the passions aroused by it. What about the wife who finally attacks her husband after years of being brutalized? The woman who pulls a gun on the man after he stalked and terrorized her relentlessly for months? The neighbor who torches the crack house to protect his children? Given the levels of domestic violence, child sexual abuse and drug addiction that plague our nation, it is not at all uncommon to

---

[11] Title II, Sec. 204; 18 U.S.C. section 3663A (a)(2).

be a victim one day and a defendant the next. Likewise, given the numbers of wrongful accusations and convictions, many crime victims of today may well be tomorrow's wrongly accused and/or incarcerated.

When is someone a victim? Under the traditional American system of justice there really is no victim until it is determined that: (1) a crime was committed; and (2) the defendant is guilty of the crime. By their sweeping language, H.J. 173 and H.J. 174 immediately rush to give these complaining witnesses the "victim" label, so that the accused becomes "the perpetrator" **at the inception of the criminal justice proceedings**. For instance, in effect seating the complaining witness at counsel table, he or she has a co-equal position from which to oppose the release of the defendant on bail. Thus, the government's burden of proof has been lightened; indeed it has been removed.

The identification of the defendant is nowhere as tricky. At least after the government's formal charge, it is obvious who the defendant is. As a matter of fact, rightly or wrongly, he or she is often instantly notorious due to the mere accusation of crime. Was it not in part for this very reason that the Founders drafted a Bill of Rights to correct for the abuse of power when the government targets the individual? As discussed throughout my testimony, by reallocating power to ambiguous private interests, safeguards of the Fifth, Sixth, Eighth and Fourteenth Amendments are effectively eliminated by this proposal.

What **will** our courts make of this amendment, which cobbles together an extraordinary mix of global rights (e.g., "fairness," "dignity," and "respect"), with a litany of entitlements (e.g., notice; presence and comment at most stages of the process; resolution of the proceedings "in a prompt and

timely manner;" "protection from physical harm or intimidation;" "restitution").[12] For instance, does the constitutional promise of "speedy" proceedings empower the "victim" to effectively run the court's docket and determine the time in which a case must go to trial, to the detriment of the prosecution's readiness to present its evidence and the ability of the accused to defend against the charges?

Further, what would be the "remedies" for breach by the government of these victim entitlements created by the proposed amendment? A Section 1983, civil rights suit, "overturning" **DeShaney** and a long line of Supreme Court cases following **DeShaney**?[13] For example, when the county prosecutor fails to notify a victim of a court hearing, is he or she to be subject to suit for violation of the plaintiff-victim's federal civil rights? As anyone who has passed the first year of law school knows, **injunctions** cannot remedy after-the-fact constitutional violations. And there can be no constitutional rights without remedies.

Certainly this whole new range of entitlements is contrary to the preservation of judicial independence, the efficient administration of justice, and a Tenth Amendment concern about excessive "federal" causes of action. The amendment takes traditional and historic state power over criminal justice matters and federalizes it, both as a matter of procedures **and** substantive criminal law. As already discussed, a "victims' rights" amendment would surely produce an increasingly

---

[12] See e.g., H.J. Res. 173, Section 1.

13 See **DeShaney v. Winnebago County Dept. Of Social Serv.**, 489 U.S. 189, 196 (1989) (construing 42 U.S.C. sec. 1983, et seq.) ("The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.")

litigious society -- carrying with it economic costs; and on this scale of "private prosecution" by "victims," very significant ones at that.

Consider, for example, that the amendment would subject both state and federal governments to its broad set of "victim rights" and entitlements (e.g., to "reasonable protection"). Conflicts in the interpretation of the amendment's provisions -- between state and federal courts and among the many state jurisdictions -- would abound, and a chaotic of body of law invites litigation, and more chaos.[14] Courts are public resources. And irrational litigation is a great drain on tax dollars and the economy.

The costs of the federally mandated notice requirements alone -- without regard to the expenses that will flow from other victims' entitlements -- are staggering. By its language, these proposals appear to mandate (**without funding**) the expenditure of state tax dollars to enforce federal constitutional benefits. This creation of affirmative duties on the part of the states is surely the "big government," "welfare state" conservatives have decried.

In short, the distortion of the courts undermines impartiality, judicial administration and the rule of law to the risk of us all. This open-ended list of promised protections, well-being, and empowerment to those claiming victim status raises scores of interpretation questions, and no certain answers. And no amount of "technical" tinkering with amendment language will stave off the litigation debacle to be spawned by the attempt to offer such rights and entitlements by way of

---

[14] See e.g. Judge Gerald Bard Tjoflat, "More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary," 79 A.B.A.J. 70 (July 1993) (explaining that when the law is unstable, parties cannot know what to expect: their rights and entitlements then depend largely on the "luck of the draw" -- "on the trial judge (and ultimately on the appellate panel).").

constitutional amendment.

We respectfully submit that this Committee and the Congress would better serve the people, including all types of victims, current and potential, were it to order a thorough and objective study of the costs and impacts of "victims' rights reforms" currently being tested at the state level. Such a careful study should certainly be undertaken before this Committee moves forward in its consideration of a federal magnification of the "victims' rights" phenomenon through an amendment to the United States Constitution.

Judicial Independence: Another Forgotten Victim?

More specific, the proposed amendment threatens not only the rights of the accused and the system of public prosecution. It also deprives the judiciary of its independence and impartiality, by aiming to convert judges into "victims' rights" advocate-adjuncts, and courts into "victims' rights" fora.

The Fifth, Sixth and Fourteenth Amendments guarantee all criminal defendants, in both state and federal courts, the fundamental rights to a fair trial and an impartial jury. The basic components of a fair trial include a presumption of innocence; [15] and the requirement that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial.[16] The Sixth Amendment requires that our tribunals remain "free of prejudice, passion,

---

[15] See e.g. **In re Winship**, 397 U.S. 358, 363 (1970); **Coffin v. United States**, 156 U.S. 432, 453 (1895).

[16] See e.g. **Taylor v. Kentucky**, 436 U.S. 478, 485 (1978).

excitement and tyrannical power."[17] Without these safeguards, the presumption of innocence so crucial to a fair trial would be abrogated. And judicial independence **ensures these safeguards**.

Contrary to disclaimers by "victim's rights" advocates, their participation during a trial is not a neutral or benign force vis-a-vis the constitutional protections for the citizen accused. Already, the appearance of large groups visibly identified with the alleged victim inside courtrooms has become commonplace throughout the country. And often these contingents do not merely observe the proceedings in a respectful manner, but make themselves known to the judge and jury in a way that threatens undue influence over the decision-makers. Courts have long held that conduct by victims' supporters may indeed subvert the presumption of innocence.[18]

CONCLUSION

Sensitivity to the legitimate concerns of victims of crime does not require a constitutional amendment. To the extent these issues require a federal government response, it could be (and largely has been) accomplished through straight-forward legislation.[19] Any reforms in this area

---

[17] **Chambers v. Florida**, 309 U.S. 227, 236-237 (1940).

[18] See e.g. **Norris v. Risley**, 918 F.2d 828, 833, n.5 (9th Cir. 1990) (Boochever. J.) (Holding that button-wearing NOW "Task Force" advocates, "anxious for a [rape] conviction," admittedly believing the accused to be guilty even before hearing any evidence, and seeking a far broader and more active role in his trial in order to "make a statement" about his presumed guilt, threatened to overwhelm his ability to get a fair trial). See also **State v. Franklin**, 327 S.E.2d 499, 455 (W.Va. 1985) (MADD activists).

[19] See e.g. Title II, Sec. 204; 18 U.S.C. sec. 3663A (a)(2) ("Justice for Victims" (including mandatory restitution); 18 U.S.C. sec. 3555 ("Notice to Victims"); 18 U.S.C. sec. 1514 ("Civil Action to Restrain Harassment of a Victim or Witness"); 18 U.S.C. sec. 3525 ("Victims Compensation Fund"). See also the numerous state and federal provisions cited and discussed in Professor Henderson's Stanford Law Review article, attached (e.g.,

should be focused on the states, not the federal government. The overwhelming number of crimes, especially violent ones, are rightly handled in state court systems.[20]

Criminal defense lawyers are fully supportive of legal reforms that would require law enforcement and prosecutorial agencies to treat crime victims with sensitivity and respect, as well as those that include restitution as a sentencing option, especially when it is used intelligently, in lieu of a lengthy sentence for a non-violent offender. However, the greatest good we all can do for victims is to **decrease their numbers**. We certainly should not be **increasing** their numbers, as these amendment proposals seem sure to do. Rather than wasting our limited tax dollars on a costly and probably dangerous constitutional amendment process, all Americans would be better served by careful study. Such a study should include thorough and objective assessment of the costs and consequences upon our justice system of the current plethora of so-called "victims' rights reforms." And it should focus on the inevitable costs and consequences of federalizing such measures through our precious Constitution.

Elisabeth Semel
Co-Chair, Legislative Committee
National Association of Criminal Defense Lawyers (NACDL)

---

at nn. 308, 315, 335, 340, 348, 357, and accompanying text).

[20] See e.g., Hon. Edwin Meese III and Rhett DeHart, "How Washington Subverts Your Local Sheriff," Policy Review (Jan./Feb. 1996).

ATTACHMENT EXHIBIT A

The Wrongs of Victim's Rights

Lynne N. Henderson*

TABLE OF CONTENTS

In the last few years, the issue of "rights" for victims of crime has become influential in shaping criminal law and procedure. In 1982 alone, California voters approved a "Victim's Bill of

* Assistant Professor of Law, Florida State University. B.A. 1975, J.D. 1979, Stanford University. The author gives special thanks to Paul Brest and Robert Weisberg for their friendship and assistance with this article. I would also like to thank Robert Babcock, Donald Dripps, Lars Gregor, Robert Gordon, and Mark Kelman for their helpful comments on earlier drafts and their suggestions of resource materials and approaches. Any errors of course remain mine. Finally, thanks are due Jim Klouda, Florida State College of Law, Class of 1986, for his research help.

Rights" that made substantial changes in California law,[1] and the President's Task Force on Victims of Crime issued its final report, recommending numerous changes in the criminal justice system.[2] The influence of the victim's rights "movement" appears to be creating a new era in American criminal law and procedure.

This article examines the impact that current victim's rights proposals and programs will likely have both on the criminal process and on victims, and explores the rationales offered in support of these proposals. The discussion focuses on whether changes in the criminal law and criminal process are desirable for those who have already been victimized.[3] The article also makes some observations on whether these changes have any salutory effect on the goal of crime prevention. Part I examines the increasingly public structure of the criminal process and presents a brief history of the victim's rights movement. Part II proposes a theory of victimization which emphasizes its highly individual and experiential nature. Part III outlines a composite victim's rights proposal. Part IV looks at the proposed changes in the legal process bearing on the guilt stage of the trial and examines the usefulness of these changes to victims. Part V then explores whether victim participation at sentencing can be justified in terms of traditional rationales for the criminal sanction, on due process-like grounds, or on individually based, existential grounds. Finally, Part V discusses the problems created by the issue of restitution to crime victims.

I. The Origins of Victim's Rights

A. *The Historical Role of the Victim in Criminal Law*

The available historical work in the field of the criminal law reveals a steady evolution away from the "private," or individual, sphere to the "public" or societal one. In Europe and England after the collapse of the Roman Empire, the victim and the criminal process were intimately linked. No formal government structure existed; thus, "criminal justice" largely depended on self-help or the help of kin.[4] The blood feud constituted the major enforcement mechanism, both in England and on the continent.[5] The victim, or his or her kin, exacted vengeance against and received payment from the perpetrator or his kin.[6] At the same time, however, a rudimentary public enforcement mechanism, "outlawry," existed both on the continent and in England.[7]

As English society became more organized, and feudal lords began to assert dominion over others, the law of the blood feud became more refined and subordinated to "public" interests. It became unlawful to begin a blood feud unless an effort was made to extract a sum of money from the offender.[8] At the same time that use of the blood feud was declining as the primary vehicle for enforcing criminal law, monetary compensation to victims or their kin ("bot" and "wer"), and fines payable to the king ("wite"), developed into a complicated system of tariffs that carefully set out the value of every sort of injury imaginable.[9] This system of compensation would appear to be solicitous of a victim's right to restoration from the wrongdoer, but in practice, victims seldom received compensation.[10]

1. See note 83 *infra*.

2. See note 71 *infra*.

3. The author draws on her experiences as both a public defender and a victim of a violent crime for insight as to effects of crime on the victim and of recent changes in the criminal process.

4. 1 J. Goebel, Felony and Misdemeanor 15–21 (1937); Berman, *The Background of the Western Legal Tradition in the Folklore of the Peoples of Europe*, 45 U. Cin. L. Rev. 553 (1976).

5. *See, e.g.*, 2 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I, at 449–50 (2d ed. 1899); 1 J. Stephen, A History of the Criminal Law of England 60 (1883); Berman, *supra* note 4, at 554–55.

6. Berman, *supra* note 4, at 557; *see also* 1 J. Goebel, *supra* note 4, at 331. But even the blood feud had certain social rules and rituals. In the "law of homicide, for example, not all lives were of equal worth, thus a blood feud might require the deaths of several persons, or the expropriation of cattle or more assets, to atone for the loss of a single individual. See 2 F. Pollock & F. Maitland, *supra* note 5, at 450; Berman, *supra* note 4, at 556–57.

7. See 2 F. Pollock & F. Maitland, *supra* note 5, at 450. Under the old Germanic laws, a person who broke the law could be attacked by the entire community in which he lived. Because the lawbreaker was considered to have gone to war with the community, the community's response was to go to war with him: to banish him, pursue him, kill him, ravage his land, burn his house. *Id.* at 449. Thus, even in pre-modern Western society, a public as well as private framework for action to remedy crime existed.

8. *Id.* at 454. A killer, for example, was given a year to pay the victim's family the value of the victim's life, generally determined by a complex set of class-based rules before the family could begin the blood feud. *Id.* The fine of the killer were exempt from the feud unless they had refused him. *Id.*

9. *Id.* at 449–454.

10. The crime tariffs were oppressive. Pollock and Maitland observed:

> From the very first it was an attribute of the system not only that it made a distinction between those who were "dearly born" and those who were cheaply born, but it widened the gulf by impoverishing the poorer folk. . . . [T]he

In England, as the kings gained and solidified authority, the concept of "the king's peace" prevailed, and criminal acts were seen by the legal system as offenses against the crown rather than against the individual.[11] Outlawry was transformed from a punishment to a process for compelling the attendance of the accused at trial.[12] Severe punishments, such as the taking of life and limb, were placed solely in the hands of the king and his representatives.[13] Minor crimes were punished chiefly by monetary fines instead of the wite,[14] and damages to victims or their families were determined and assessed by a tribunal rather than a system of tariffs.[15]

As early as the thirteenth century in England, the law of felony appeared to serve the feudal system and the lords far more than it did the victims.[16] The lords' consolidation of power, the greed of kings, and the need for a coherent system of laws transformed criminal law from a mixture of public and private law, to Law of an exclusively public nature.[17] A similar shift from a mixed system to an exclusively public system took place on the continent.[18] As English criminal law became more public, victims lost some discretion once they initiated a prosecution,[19] but still retained an important role in the process through the unique English system of "private" prosecution.[20] Private prosecution initially appears to demonstrate a solicitude towards victims absent in every other system,[21] but in fact, it was not very beneficial to the victim.[22] By the nineteenth century, the British system of private prosecution had little to do with concern for victims of crime.[23] In England today, serious cases are reviewed and sometimes prosecuted by the Director of Public Prosecutions, and

reckon up the causes which made the bulk of the nation miserable or the lands of lords, but and wise should not be forgotten

Id. at 160. While the system outwardly reconciled the stern facts of rough justice with a Christian reluctance to shed blood," *id.*, Pollock and Maitland submitted that the demand for money instead of life was essentially delusive, because few persons were likely to pay, and most were outlawed or sold into slavery. *Id.* at 160–61.

11. *Id.*

12. *Id.* at 157–58. 1 J. GOEBEL, *supra* note 4, at 129–33.

13. 1 POLLOCK & F. MAITLAND, *supra* note 9, at 157–61.

14. *Id.* at 458.

15. *Id.* at 158–59.

16. For example, willful homicide became a capital offense, and the kin of the slain lost their right to wer and to compensation. Only later was a statute specifically enacted to create a claim for damages in homicide cases. *Id.* at 159. A felon's lands went to the king; his chattels were confiscated. *Id.* at 165–66.

17. *Id.* at 154–61. 1 J. STEPHEN, *supra* note 5, at 102. Although this summary obviously supplies a complex historical change, it does so to emphasize that the form and function of criminal law shifted substantially from the individual to the state. *See also* Greenberg, *The Victim in Historical Perspective: Some Aspects of the English Experience* 10 J. SOC. ISSUES 77 (1984).

18. Berman, *supra* note 4, at 554–54.

19. *See* Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96, 102 (1983); Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317–24 (1973). *But see* Hay, *Controlling the English Prosecutor*, 21 OXFORD J. LEGAL STUD. 165, 167–80 (1983) (English private prosecution in eighteenth and nineteenth century was largely discretionary).

20. *See* Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 47–51 (1980) (lay crime victims had discretion both in bringing charges and in determining whether larceny would be a capital offense). *But see id.* at 56–58 (although victim or private accuser was called prosecutor and played an "essential role" in prosecuting, prosecution had official support of constables and justices of the peace, the coroner handled homicide cases).

21. *See* Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); Comment, *Private Prosecution: A Remedy for District Attorney Unwarranted Inaction*, 65 YALE L.J. 209 (1955). Although the idea of having private prosecutions in the United States has been proposed as a remedy for victims of crimes, *see* Goldstein, *supra*, at 558–61; Comment, *supra*, and there are occasional "private prosecutions" or instances of private aid to district attorneys, private prosecution has never really played a prominent part in American criminal justice.

Goebel and Naughton's history of the development of a criminal justice system in colonial New York notes the system was a mixed one of public and private prosecutions, depending on the location of the prosecution. Officials frequently brought formal accusations, however, and the office of the attorney general conducted many criminal prosecutions in the name of the Crown by the 1700s. J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 329 n.11, 330–31, 337, 649–51 (1944) (in East Jamaica, officers were prosecuted on complaints of injured persons' attorneys; on New York City, the sheriff filled role of law enforcement official and prosecutor, the Attorney General's power increased throughout 1700s as direct representative of the Crown's interests). Public prosecution developed throughout the colonies; apparently, and certainly was firmly in place by the time the English were debating the issue.

22. By the nineteenth century, the expense of conducting investigations and of bringing private prosecutions placed a heavy burden on victims. Kurland & Waters, *Public Prosecutions in England 1854–79: An Essay in English Legal History*, 1959 DUKE L.J. 493, 542, and while compensation and reward schemes were used to encourage prosecution they frequently were insufficient. *Id.* The poor could not prosecute at all. *Id.* at 515. Moreover, in serious cases the constable had played an important role, and the coroner had become largely responsible for prosecuting homicide. Langbein, *supra* note 20, at 55–56. Finally, the severity of criminal penalties in England for hundreds of crimes—death or transportation—effectively foreclosed any chance for victims to obtain tort damages. *See also* note 10 *supra*.

23. Kurland & Waters, *supra* note 22. The English debates leading up to the institution of the public prosecutor's office are mostly silent on the burden private prosecution placed on crime victims. Instead the conflict centered on abuse of authority and loss of lawyers' jobs and the need for coordination and effective prosecution. *See id.* at 528–60. The English use of private prosecutions to enforce criminal statutes for most of England's history may simply have been a peculiar result of metes, vested interests that had grown over time, and suspicion of authority. *Id.* at 561–62.

police prosecute most of the other cases.[24] Historically then, even in England, the victim has gradually ceased to be a significant actor with a formal role in the criminal process.[25] But the fact that the victim's role in the process steadily lessened over time does not necessarily justify the lack of a formal role for victims today.

The apparent visibility of the criminal process and the unlikelihood that most victims can successfully pursue the offender through tort law[26] may be partially responsible for the current view that the victim should have a greater role in the criminal process. The following section will discuss the rise of this view in American criminal law and procedure.

B. *The Role of the Victim in Recent American Criminal Law*

The American system of criminal law and procedure has re-

24. *See, e.g.*, R. Jackson, The Machinery of Justice in England 211 (7th ed. 1977) (people are usually "content" to leave the conduct of the prosecution to the police); Hay, *supra* note 19, at 180 (fewer than three percent of English prosecutions are conducted by private individuals; about nine percent of shoplifting cases are prosecuted by retail stores). *But see Proposed Independent Prosecuting Service: The Prosecutor's Viewpoint*, 1984 Crim. L. Rev. 302 (1984); *Independent Prosecutors*, 134 New L.J. 1001 (1984) (both criticizing a government proposal to create a centralized national prosecution office). For a recent discussion of the English criminal process, see Hughes, *English Criminal Justice: Is it Better Than Ours?*, 26 Ariz. L. Rev. 507 (1984).

25. Of course, crime victims retain a private right of action in tort against criminals. Today, just as in the fourteenth century, the tort right to compensation in damages theoretically addresses the harm to the individual, while criminal prosecution theoretically addresses the social or public harm of criminal acts. In theory, the law has recognized the harm that victims have suffered and has provided a mechanism for redress. The separation of the treatment of individual claims from that of societal claims for criminally caused harms, and the resulting separation into the private and public spheres, however, creates the appearance that the law virtually ignores victims of crimes. *See* R. Reiff, The Invisible Victim: The Criminal Justice System's Forgotten Responsibility xi (1979) ("Society—sensitive to the issues of social justice for the offender—spends millions of dollars on programs for offender-oriented court reform and rehabilitation. On the other hand, society fails to protect crime victims, degrades them socially, and refuses them aid."); J. M. Hyde, The Rights of the Victim 1 (1983) ("For the most part, victims are the innocent and neglected element in the criminal justice system."); Goldstein, *supra* note 21, at 519 ("the victim has been left to play a distinctly secondary role" in the criminal justice system). And while in theory the tort system provides redress for the individual, in fact victims often have no hope of recovery because many identified offenders are unable to pay damages. *See* notes 311-321 *infra* and accompanying text.

26. Those who do find a "deep pocket" can and do pursue the offender in actions for civil damages. *See* Rios, *Drunken Driving Victim and Family Get $11 Million*, San Jose Mercury News, Sept. 21, 1983, at 1A, col. 3; *S.F. Jury Gives Burgled Homeowners $100,000*, San Francisco Chron., July 28, 1983, at 2, col. 2.

flected a tension between social and individual approaches to crime prevention.[27] Liberals have focused on isolating and curing perceived *social* causes of crime; conservatives have concentrated on perceived *individual* wickedness as the cause of crime.[28] From the post-World War II period to the mid 1960s, liberal theories were ascendant, with respect to both the social welfare approach to crime prevention and offenders and the classic liberal ideology of protecting the individual from the overreaching power of the state.[29] Liberals emphasized the social origins of crime—poverty, alienation, lack of education, discrimination—and sought to remedy these perceived causes of crime.[30] They advocated rehabilitation, rather than punishment, of convicted criminals.[31] And they sought to protect the constitutional rights of the accused, finding a responsive majority in the United States Supreme Court.[32] Some of the liberal experiments failed,[33] and

27. Perhaps it is the influence of the crime control ideology, *see* notes 47-51 *infra* and accompanying text, that causes us to rely so heavily on tinkering with law enforcement and the conviction process to eliminate crime. Perhaps it is that the costs of doing so remain hidden, while the costs of other crime prevention methods are more obvious and direct. It is far easier for legislatures to enact "tough" penalties than to consider what might be done to prevent crime generally. Another reason why we focus on the criminal justice system may be that it not only has a "unique visibility," but it also provides a powerful apparatus for the support of a particular ideology. J. Reiman, The Rich Get Richer and the Poor Get Prison 102-03 (2d ed. 1984). That ideology "conveys the message that there are no dangerous crimes unique to the wealthy" and that it is the poor who are responsible for crime. *Id.* at 106. It conveys the image of equal treatment of rich and poor, however, to avoid any charge of class bias, and it "conveys the message that crime is not the result of the deprivations of poverty but rather of individual moral failings." *Id.* The implicit ideology of criminal law focuses on individual offenders, diverting attention from the evils present in the social order and in established institutions. *Id.* at 110.

28. *See* Kelman, *Criminal Law: The Origins of Crime and Violence*, in The Politics of Law 214, 220 (D. Kairys ed. 1982); *see also* R. Clark, Crime in America 3-4 (1970).

29. *See, e.g.*, Bayer, *Crime, Punishment, and the Decline of Liberal Optimism*, 27 Crime & Delinq. 169, 172 (1981) (the main current of liberal thought is optimistic, focusing on social roots and psychological bases of crime as remediable); Currie, *Crime and Ideology*, Working Papers, May-June 1982, at 26 (in the 1960s, public debate about crime was dominated by a liberal vision that linked violence to social disadvantage and held out promise that "social rehabilitation programs" would reduce the crime rate); *see also* C. Silberman, Criminal Violence, Criminal Justice 227-30 (1978) (reflecting mainstream liberal ideology and solutions throughout). *See generally* R. Clark, *supra* note 28.

30. *See* Bayer, *supra* note 29; Currie, *supra* note 29.

31. *See* Bayer, *supra* note 29, at 179-80; *see also* F. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (1981).

32. The Warren Court's concern for the rights of the accused and its selective incorporation of provisions of the Bill of Rights amounted to a "revolution" in criminal procedure. *See* L. Baker, Miranda: Crime, Law, and Politics (1983); Allen, *The Judicial Quest for Penal Justice: The Warren Court and Criminal Cases*, 1975 U. Ill. L.F. 518.

some never had a chance of succeeding as the funds and interest that supported programs disappeared.[34] Nevertheless, some remnants of liberal programs remain today, including the application to the states of important provisions of the Bill of Rights by the Warren Court.[35]

Concern for victims of violent crime—at least "innocent" victims of violent crime—was also on the liberal agenda and took the form of advocacy of "victim's compensation" statutes in the early and mid-sixties.[36] The impulse behind the enactment of victim's compensation statutes was largely humanitarian and "liberal." A social welfare argument pervades the victim's compensation literature of that era.[37] By the mid 1970s, many states had adopted some form of victim's compensation program,[38] and law journals published numerous articles on the subject.[39]

---

33. Indeterminate sentencing is a prime example of a failed experiment. Based on a rehabilitative approach to the criminal sanction, the indeterminate sentence could not withstand criticism of rehabilitation itself as a proper function of the criminal sanction. See text accompanying notes 247–248 infra; see also C. Silberman, supra note 29, at 501–05.

34. See Baker, supra note 29, at 170–79; Currie, *The Conservative New Criminology*, Soc'y, Mar.–Apr. 1977, at 8, 12–13; Silver, *Crime and Conventional Wisdom*, Soc'y, Mar.–Apr. 1977, at 9, 17. Longitudinal studies of social welfare programs instituted in the 1960s reveal that at least one program, Head Start, has had a salutary effect in reducing crime rates. *See Science and the Citizen, Head Starts*, Sci. Am., Mar. 1981, at 82 (commenting on Schweinhart & Weikart, *Young Children Grow Up: The Effects of the Perry Preschool Program on Youths Through Age 15*, in The High/Scope Educational Research Foundation (1980) (preschool-age students who participated in enrichment program had lower arrest rates up to age 15 than members of control group)).

35. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo. L.J. 151 (1980).

36. Penal reformer Margaret Fry first proposed victim's compensation in 1957. *See* Fry, *Justice for Victims*, in Considering the Victim: Readings in Restitution and Victim Compensation 54, 56 (J. Hudson & B. Galaway eds. 1975) [hereinafter cited as Readings]. Fry's efforts led directly to the establishment of victim's compensation programs in New Zealand and Great Britain. The *Journal of Public Law* published a symposium on victim compensation in 1959. The *Minnesota Law Review* followed suit in 1965. In 1965 California became the first state in this country to adopt a victim's compensation program. *See* S. Schafer, Compensation and Restitution to Victims of Crime 153 (2d ed. 1970).

37. *See* note 358 *infra*.

38. As of 1970, California, Hawaii, Maryland, Massachusetts, and New York had adopted victim's compensation programs. *See Governmental Compensation for Victims of Violence*, 43 S. Cal. L. Rev. 1, 158–93 app. (1970). Wisconsin adopted its first compensation statute in 1975. *See* 1975 Wis. Laws ch. 344, § 3. Minnesota enacted its victim's compensation statute in 1974. *See* 1974 Minn. Laws ch. 463, § 3. New Jersey adopted victim compensation in 1971, Alaska in 1972. *See* 1971 N.J. Laws ch. 317, § 1; 1972 Alaska Sess. Laws ch. 203, § 1.

39. *See, e.g.*, *Compensation to Victims of Personal Violence: An Examination of the Scope of the Problem*, 50 Minn. L. Rev. 213 (1965) (symposium); *Governmental Compensation for Victims of Violence*, *supra* note 38, at 1 (symposium).

Then the liberals began to lose momentum and initiative in dealing with the problem of crime. The disappearance of liberal influence has several possible and related explanations. First, the "crime rate" kept climbing, seemingly refuting liberal theories of crime prevention.[40] Second, crime, in the American mind, was often associated with race.[41] The liberals' arguments for racial equality created a political paradox that prevented them from confronting the relationship between race and crime[42] and the ever-present national fear of interracial crime.[43] Third, the fact that many "crime prevention" techniques historically had been used to oppress blacks and other minorities made liberals cautious: The techniques of crime control were also the techniques of oppression.[44] Finally, liberal rhetoric failed to overcome the reality and fear produced by photographs and news reports of riots, burning cities, and vicious and barbaric crimes.[45]

The decline of support for liberal approaches and the inability of liberals to solve the apparent paradoxes created by their beliefs left the crime issue to the conservatives.[46] Conservatives pointed to the failures of liberal programs and emphasized that crime was a matter of individual choice and wickedness. They adhered to the "crime control" model of criminal justice[47] that

---

40. *See* M. Fleming, Of Crimes and Rights: The Penal Code Viewed as a Bill of Rights 15 (1978); E. Van Allen, Our Handcuffed Police: The Assault Upon Law and Order in America and What Can Be Done About It 85–86 (1968); J. Wilson, Thinking About Crime 3 (1975). All of these works contain conservatively oriented chronicles of rising crime rates. *See also* Currie, *supra* note 29 (rising crime rate of 1960s made liberal vision "a shambles.").

41. *See* C. Silberman, *supra* note 29, at 159–61.

42. *Id.*

43. "No single event ticks off America's political schizophrenia with greater certainty than the case of a black man raping a white woman. . . . Racism and sexism and the fight against both converge at the point of interracial rape, a baffling crossroads of an authentic, peculiarly American, dilemma." S. Brownmiller, Against Our Will: Men, Women & Rape 230 (1975).

44. *See* Institutional Racism in America 58–77 (L. Knowles & K. Prewitt eds. 1970). When *Furman v. Georgia* was decided by the Supreme Court, some of the Justices relied on the obvious racial discrimination in death penalty cases to strike down Georgia's death penalty statute. Furman v. Georgia, 408 U.S. 238, 242–57 (Douglas, J., concurring); *id.* at 364–65 (Marshall, J., concurring).

45. *See* Baker, *supra* note 29, at 178–79.

46. The crime problem became "an official Republican campaign issue" by April of 1968. L. Baker, *supra* note 32, at 210 (1983); Currie, *supra* note 29, at 26–27.

47. I will be using Herbert Packer's description and definition of the crime control model when I refer to it throughout this piece. H. Packer, The Limits of the Criminal

emphasizes "efficiency" in the criminal process.[48] The model envisions a summary process, much like an assembly line, with reliance placed on administrative rather than judicial decisionmaking.[49] Central to the ideology of the crime control model are "the presumption of guilt"[50] and the belief "that the criminal process is a positive guarantor of social freedom."[51] The conservatives thus complained that the courts were "handcuffing" the police[52] and that swift and sure punishment was the only practical solution for the crime problem.[53] They also invoked the part of nineteenth century liberalism—often ignored by the post-World War II liberals—that rested on the premise that the individual is entirely rational and responsible for his or her actions.[54] Today, refusing to acknowledge the possible social causes of crime,[55] or dismissing those causes as insoluble,[56] con-

---

Supp. 1149–73 (1968). The rhetoric and ideology of "crime control" (or "law and order") have changed little since Roscoe Pound first lectured on the issues of criminal justice sixty-one years ago. *See* R. POUND, CRIMINAL JUSTICE IN AMERICA (1945). Then, as now, the complaints were that the courts were "soft on crime" and that the crime rate had the good citizens of the nation terrified. Yet the procedural protections afforded defendants then were far fewer than those available now.

48. H. PACKER, *supra* note 17, at 158.

49. *Id.* at 160.

> The model, in order to operate successfully, must produce a high rate of apprehension and conviction. . . . There must then be a premium on speed and finality. . . . [E]xtrajudicial processes should be preferred to judicial processes, informal operations to formal ones. . . . The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model.

Id. at 159.

50. *Id.* at 160 ("presumption of guilt is what makes it possible for the system to do its work efficiently with large numbers").

51. *Id.* at 158. Packer observes that the values contained in the crime control model are grounded "on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order. . . ." *Id.*

52. One conservative book attacking the Warren Court's decisions used this phrase for its title. F. VAN DEN HAAG, *supra* note 40. The law enforcement and conservative communities launched a number of stinging attacks on the Court after it decided *Miranda*. *See* L. BAKER, *supra* note 32, at 200–05.

53. *See, e.g.*, F. VAN DEN HAAG, PUNISHING CRIMINALS 157–68 (1975) (arguing that offenders are not caught or punished as a result of court decisions and that police and trial court judges are thwarted by laws and appellate decisions that favor defendants).

54. Van den Haag, *Crime, Punishment, and Deterrence*, SOC'Y, Mar.–Apr. 1977, at 11.

55. F. VAN DEN HAAG, *supra* note 53, at 155–57.

56. *See* Wilson, *Thinking About Crime*, ATL. MONTHLY, Sept. 1983, at 72 [hereafter cited as Wilson *Thinking*]; Wilson, *Thinking About Thinking About Crime*, SOC'Y, Mar.–Apr. 1977, at 10.

servatives place most of the responsibility for crime and crime control on the "criminal justice system" and particularly on the courts.[57]

According to the conservative argument, deterrence often doesn't work,[58] rehabilitation doesn't work,[59] and retribution[60] and incapacitation[61] are the only tenable justifications for punishment of criminals. Throughout the 1970s, "tough" sentencing laws passed legislatures with regularity.[62] Yet even with record numbers of persons in prison,[63] and later with the reappearance

---

57. Van den Haag asserts: "The probability of convicting the guilty is greatly reduced in the U.S. by (a) delay, (b) the exclusionary rule, and (c) literally endless appeals allowed defendants from state to federal courts." F. VAN DEN HAAG, *supra* note 53, at 164.

58. One conservative author has been unwilling to abandon deterrence theory, entirely, however. *See* Wilson, *supra* note 56, at 72–81.

59. *See, e.g.*, F. VAN DEN HAAG, *supra* note 53, at 183–91 (arguing that rehabilitation is impossible without retributive punishment and that rehabilitation does not affect recidivism rates).

60. When the California legislature enacted determinate sentencing after almost 60 years of indeterminate sentencing based on a rehabilitation premise, the determinate sentencing law began: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." CAL. PENAL CODE § 1170(a)(1) (West 1984). S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 205 (4th ed. 1983).

61. Renewed interest in incapacitation has resulted in "habitual offender" or "career criminal" statutes in many states. *See, e.g.*, CAL. PENAL CODE §§ 999b-h (West Supp. 1984) (establishing "career criminal" program); CAL. PENAL CODE §§ 667, 667.5, 667.7 (West 1982) (increasing sentences for "habitual offenders"); KY. REV. STAT. ANN. § 532.080 (Baldwin 1984) (providing that the jury determine whether the offender is a "persistent felony offender" and allowing imposition of life imprisonment on such finding); LA. REV. STAT. ANN. § 15:529.1 (West 1981) (making life imprisonment without possibility of parole a possibility for people convicted of a prior felony); N.Y. PENAL LAW § 70.10 (McKinney 1975) ("persistent felony offender" may be sentenced to a minimum of 15–25 years or a maximum of life imprisonment).

62. The oft-cited example is the change in California's indeterminate sentencing law in 1976, when the penal code was revised to declare "that the purpose of imprisonment is punishment." CAL. PENAL CODE § 1170(a)(1) (West 1984). Governor James Thompson of Illinois recently wrote that "[t]he tough sentencing laws I fought for in the General Assembly and which are now law . . . are not the primary causal factor in prison overcrowding." Thompson, *Introduction: Illinois' Response to the Problem of Prison Crowding*, 1984 U. ILL. L. REV. 203, 204. Those "tough sentencing laws" became effective in 1978. Caspar, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 237; *see also* R. JACKSON, LAW AND DISORDER 25–26, 141–54 ("tough on crime" postures used by New York gubernatorial candidates in the 1970s; legislators respond to the level of fear and anger transmitted to them by their constituents).

63. In 1970, there were approximately 196,000 persons incarcerated in prisons in the United States, or 97 prisoners per 100,000 in the population. In 1980, there were approximately 321,000 prison inmates, or 142 prisoners per 100,000 people. By 1983, the number of prisoners had grown to 455,000. Since the beginning of 1983, the prison

of the death penalty,[64] the "crime rate" continued to increase.[65] In part, conservatives attributed this failure to control crime to the courts. Conservatives had never truly accepted the Warren Court's concern for the rights of the accused. The exclusionary rule and *Miranda* requirements particularly irritated them, because they firmly believed that these rules interfered with efficient law enforcement and crime control.[66] In their view, the courts were letting desperate criminals loose on "legal technicalities" and preventing the police from protecting the innocent public, and therefore were to blame for the high rate of crime. Yet the Bill of Rights speaks of restraints on the state's power to act against the *individual*, and the procedural protections adopted by the Warren Court sought to remedy the imbalance of the power of the state against the individual accused of a crime. The "discovery" of the crime victim provided an individual to substitute for the state on the side of the scales opposite the accused, thus making it appear that the balance was more "equal."[67]

While law enforcement officers and prosecutors have long understood the symbolic value of the victim, the politicization of the

population in this country has increased by approximately 222 inmates per day. *See* Benavenga, Book Review, Christian Sci. Monitor, Mar. 11, 1981, at 18, col. 1.

64. After nearly a decade in which no one was executed in the United States, the Supreme Court upheld Georgia's death penalty statute. Gregg v. Georgia, 428 U.S. 153 (1976). The pace of executions did not accelerate, however, until 1983, after the Court decided four cases that arguably overruled its decision in Furman v. Georgia, 408 U.S. 238 (1972). *See* Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305 (explaining the Court's doctrinal retreat from death penalty cases); Press, *Rate of Executions Picks up in U.S.*, Christian Sci. Monitor, Nov. 15, 1984, at 3, at col. 2 (six persons executed between 1977 and 1983, five executed in 1983, and nineteen executed as of November 8, 1984).

65. The crime rate has, for the moment, decreased slightly. Explanations for the slight decrease in index offenses vary enormously, depending on ideology. Criminologists have observed that the aging of the population accounts for much of the decrease, while political conservatives attribute the phenomenon to tougher law enforcement and penalties.

66. *See* Gross, *Some Anticrime Proposals for Progressives*, 234 Nation 137 (1982) (after 1980 election President Reagan made "sweeping attack" on ideology of 1960s and proposed that the exclusionary rule be reformed, preventive detention statutes be enacted, and longer prison terms be imposed). *See generally* E. Baker, *supra* note 12.

67. In 1968, for example, Van Allen wrote: "What good are our police . . . if a court like the U.S. Supreme Court continues to put what is tantamount to a premium on lawlessness while it in effect penalizes the victim . . . . We have seen what the criminal protecting U.S. Supreme Court decisions have done to the cause of justice. They have made the criminal's rights superior to those of their victim." E. Van Allen, *supra* note 10, at 119. Most of the political rhetoric of the late 1960s and the 1970s, however, focused on public fear of crime—a "future victim" posture—and largely overlooked the symbolic value of past victims.

symbol is of more recent origin. The complaint of officers and prosecutors that the courts "never think about the victim" when deciding cases in favor of defendants made "intuitive" sense: A violent crime involves at least two persons, but the focus seemed to be only on the one least "deserving" of attention or regard—the offender. Although for quite some time this argument had been only sporadically raised, by the middle of the 1970s different groups began to focus their attention on the victims of particular crimes. For example, the women's movement did much to emphasize the plight of rape victims in the legal process,[68] while the more recently formed group, "Mothers Against Drunk Driving" (hereinafter referred to as MADD), brought the victims of drunk drivers to public attention.[69] The success of these groups concerned with particular crimes and crime victims served to highlight the general importance of "victims" as an effective political symbol.[70] Conservatives thus began rhetorically to paint "the victim" as a sympathetic figure whose rights and interests could be used to counterbalance the defendant's rights, and called for a new balance to be struck by courts and legislatures.[71]

As a result of the convergence of these factors, the subject of "victim's rights" has received enormous political, media, and

68. As the women's movement gained strength, focus on deconstructing the mythology of rape grew in both medical and legal circles. *See, e.g.*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 3 (1977) ("[I]t is fitting that the 'rediscovery' of rape should coincide with the growth of the Women's Movement . . . . Women have . . . played a key role in lobbying for reforms in the law of rape."); [illegible], *Rape: The Ultimate Violation of the Self*, 133 Am. J. Psychiatry 436, 437 (1976) ("Recent attitudinal shifts have been largely due to the initiative taken by countless numbers of women who have begun to sensitize our medical, social and legal institutions about the extent to which cultural biases have determined the maltreatment of the raped victim.").

69. *See* note 76 *infra* and accompanying text.

70. The forces of "law and order" have been quite receptive to the lobbying by groups representing specific classes of victims. For example, the California rape shield statute, Cal. Evid. Code §§ 782, 1103 (West 1974), was titled the Robbins Rape Evidence Law after its co-sponsor, conservative Republican Senator Alan Robbins. The name of liberal Senator George Moscone, a co-author, is not associated with the rape shield law in California. Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 Hastings L.J. 1551, 1551 n.1 (1975).

71. *See, e.g.*, President's Task Force on Victims of Crime, Final Report (1982) (recommendations for action by governmental agencies) [hereinafter cited as Task Force]; N.Y. State Consultation Board, A Bill of Rights for Crime Victims, in 5 Victimology 428 (1980) (recommendations similar to those of the President's Task Force); Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psychologist 107 (1985) (recommending, inter alia, greater victim participation in criminal process).

legal attention.[72] Both Congress[73] and the states[74] have enacted victim's rights legislation, the President's Task Force on Victims of Crime has published its final report,[75] and groups such as MADD and "Parents of Murdered Children" continue to receive national attention.[76] Victim's rights proponents have succeeded in inducing the adoption of preventive detention laws in at least nine states.[77] Victim's rights advocates have played a role in bringing about other changes in criminal law and procedure.[78] Partly as a result of victim's rights advocacy, the number of laws requiring mandatory restitution to victims by offenders has also increased.[79]

---

72 *See e.g.*, 1 FORUM CRIMINALS AND VICTIMS (1980); M. DYER, *supra* note 25; R. REID, *supra* note 25; Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587 (1982); Goldstein, *supra* note 21; Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 U.C.L.A. L. REV. 52 (1982); R. TITUS, VICTIMS OF THE SYSTEM: CRIME VICTIMS AND COMPENSATION IN AMERICAN POLITICS AND CRIMINAL JUSTICE (1983) (empirical study of victims and victim compensation programs in New Jersey and New York); Burgess & Holstrom, *Coping Behavior of the Rape Victim*, 133 AM. J. PSYCHIATRY 413 (1976) (stages of coping with the event); Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408 (1976) (discussing reactions to victimization of rape victims); *Reactions to Victimization*, 91 J. SOC. ISSUES 1 (1983) (collection of articles and studies dealing with effects of criminal victimization and of victimization by disaster or disease). *See generally* Victimology, a journal, started in 1976, which specializes in criminal victimization topics.

73 Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified at 18 U.S.C. §§ 1501, 1502, 1512-15, 3579-80 (1982)).

74 *See e.g.*, MASS. GEN. LAWS ANN. ch. 258B (West 1980); R.I. GEN. LAWS §§ 12-28-1, 12-28-8 (Supp. 1983); W. VA. CODE §§ 61-11A-7 (Supp. 1984).

75 *See* TASK FORCE, *supra* note 71.

76 Mothers Against Drunk Driving (MADD) was founded in 1980 by a California woman, Candy Lightner, after her daughter was killed by a drunk driver. *See Lightner to Speak on Pain*, The Peninsula Times Tribune, May 17, 1984, at B-1, col. 4. MADD now has at least 258 chapters nationally and approximately "300,000 supporters." *President's Message*, 3 MADD NATIONAL NEWSLETTER 1 (Spring 1984).

Reid and Charlotte Hunsinger of Cincinnati, Ohio, founded "Parents of Murdered Children" in 1978 for the purpose of providing support for parents whose children had been killed. *See* Miller, *Road This If You Have Kids*, San Jose Mercury News, Apr. 17, 1981, at 1B, col. 1.

77 ARIZ. CONST. art. I, § 22(2), (3); CAL. CONST. art. I, § 28(e), (g) (as amended on June 8, 1982); COLO. CONST. § 19(1)(b); MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; TEX. CONST. art. I, § 11a; WIS. CONST. art. I, § 8(3); GA. CODE ANN. § 17-6-1(b)(2), (c) (Supp. 1984); UTAH CODE ANN. § 77-29-1 (1980).

78 The California initiative passed in 1982 instituted radical changes in California law. *See* note 87 *infra*. And in New Mexico, for example, a murder victim's mother has been successfully lobbying for changes in criminal procedure similar to those contained in California's victim's rights initiative. *See Outrage: Crime Victims Strike Back*, broadcast by KPIX in San Francisco (Apr. 13, 1984); *see also* Dyment, *Documentary Details Crime Victims' Outrage*, San Jose Mercury News, Aug. 18, 1983, at 9C, col. 1.

79 *See* notes 415-417 *infra*; *see also* Schmalz, *Crime Victims Seek a Greater Voice*, N.Y. Times, Mar. 6, 1985, at 17, col. 2 (describing recent lobbying efforts of crime victims in New York).

Most of the victim's rights activity has been far from dispassionate, and currently, the victim's rights "movement" has a decidedly conservative bent.[80] Although "victim's rights" may be viewed as a populist movement responding to perceived injustices in the criminal process, genuine questions about victims and victimization have become increasingly coopted by the concerns of advocates of the "crime control" model of criminal justice.

The phrase "victim's rights" has been used by the conservatives to invoke two symbols that tend to overwhelm critical analysis of proposals made in the name of victims. In the criminal law context, the word "victim" has come to mean those who are preyed upon by strangers: "Victim" suggests a nonprovoking individual hit with the violence of "street crime" by a stranger. The image created is that of an elderly person robbed of her life savings, an "innocent bystander" injured or killed during a holdup, or a brutally ravaged rape victim. "Victims" are not prostitutes beaten senseless by pimps or "johns," drug addicts mugged and robbed of their fixes, gang members killed during a feud, or misdemeanants raped by cellmates. Nor does the meaning of "victim" encompass the computer corporation whose trade secrets are stolen or the discount store that suffers petty pilfering. In short, the image of the "victim" has become a blameless, pure stereotype, with whom all can identify.

This image also takes two temporal forms. "Past victims" are those who have already been victimized and who give concrete meaning to the symbol. It is the past victim who, through lurid newspaper stories, "crime scene" shots on newscasts, and anguished statements, is drawn upon to provide the popular image of "victim." "Future victims" are those necessarily undefined

80 Conservative Republicans were the progenitors of Proposition 8, California's victim's rights initiative. Galante, *Exclusionary Rule Struck in California*, NAT'L L.J., Feb. 18, 1985, at 11, col. 1. Proponents of the sweeping constitutional amendment, mainly conservative Republicans, said the initiative was meant to stop California's traditionally liberal Supreme Court from giving defendants greater rights under the state constitution than they enjoy under the U.S. Constitution. *Id.* And in *In re Lance W.*, a divided California Supreme Court held that Proposition 8 effectively abolished independent state grounds for the exclusion of evidence seized by the police. *In re* Lance W., 37 Cal. Adv. Sh. 841, 878, 210 Cal. Rptr. 631 (1985). *See also* Turpen, *The Criminal Injustice System: An Overview of the Oklahoma Victims' Bill of Rights*, 17 TULSA L.J. 253 (1981) (the Oklahoma District Attorneys Association drafted the state's victim's rights legislation, lobbying by district attorneys, law enforcement officers, and "citizens" through petition led to eventual passage).

bed persons who have not yet been mugged, robbed, assaulted, raped, or burglarized, but who may become victims at some future time. Past victims may be said to represent individual and private interests, while future victims represent the public's fear of crime and its interest in crime control. Proponents of the crime control model confuse the images of past and future victims by exploiting the public's emotional identification with the anguish of past victims simultaneously with its fear of crime and victimization.[81]

"Rights" is also a powerful rhetorical device, particularly in American history and culture.[82] The term suggests both freedom from something and freedom to do something. It suggests a certain vision of independence and autonomy.[83] In the American political context, the word almost automatically raises suspicions of oppression or deprivation and has been called into service by disparate groups seeking power, entitlements, equality, or liberty, often with great success. Hence, the terms "civil rights," "women's rights," "gay rights," "the right to life," and "the right to work" pervade the current political lexicon. Similar force attaches to the concept of "victim's rights." The term has come to mean some undefined, yet irreducible right of crime victims that "trumps" the rights of criminal defendants.[84] Although the rhetoric of proponents of "victim's rights" vacillates between notions of "past victim's rights" and "future victim's rights" without explanation or clarity, the term's predominant meaning in the political context has become that of "future victim's rights."[85]

Unfortunately, the symbolic strength of the term "victim's rights" overrides careful scrutiny. Who could be anti-victim? Thus, liberals find themselves caught in yet another apparent paradox. To be solicitous of a defendant's rights is to be anti-

81 *See* notes 170–184, 214–225 *infra* and accompanying texts.

82 1 STRAUSS, NATURAL RIGHTS AND HISTORY 181–82 (1950); Berlin, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 165–66 (1970).

83 1 GINSBERG, SOCIAL PHILOSOPHY 58–59 (1973).

84 *See* text accompanying notes 181, 220–229 *infra*.

85 The rhetoric in support of Proposition 8 repeatedly emphasized the fear of future victimization and the handcuffing of law enforcement by the courts. By contrast, the *text* of Proposition 8 mentions victims in only 3 of its 21 substantive provisions. Section 10(a) provided the victim a "right to restitution," section 6(a) promised the victim a "right to a hearing" at sentencing, and section 6(b) provided the victim a right to a hearing at parole proceedings. *See* Brosnahan v. Brown, 32 Cal. 3d 236 app., 651 P.2d 274 app., 186 Cal. Rptr. 80 app. (1982) (ballot statements and provisions of Proposition 8).

victim.[86] As a result, "victim's rights" has produced an emerging structure of criminal law and procedure that closely resembles the "crime control" model so antithetical to liberal thought. Based on a simplified concept of "victim" and an unarticulated concept of "rights," the changes in the criminal process proposed or spawned by the victim's rights movement are the same changes that have long been advocated by conservatives.[87] Ironically, these changes may do little to help even the very narrow category of past victims who give meaning to the symbol. Moreover, the symbolic manipulation of the victim successfully avoids a more serious debate about how the criminal justice process should be structured and disguises the truly revolutionary nature of the reforms proposed. Whether the reforms have anything to do with victims, and whether they are desirable, are unanswered questions. Upon examination, many of the reforms appear to fail under either line of inquiry.

II A THEORY OF THE IMPACT OF CORE CRIME ON VICTIMS

Before exploring what role if any a victim should play in the criminal law process, it is necessary to explore what it means to be a "victim." Although a subspecialty of criminology called "victimology" has existed for approximately 35 years,[88] little information about the *experience* or psychology of crime victims is available.[89] Instead, the study of "victimology" has focused more

86 At least one liberal explicitly ignored the contradictions in trying to regain the momentum liberal programs had enjoyed in the 1960s by asserting that "[a] logical next step would be a Victim's Bill of Rights which could provide for various compensation, prevention against parole, prompt return of confiscated property, progress reports on the prosecution of offenders, free legal services and restitution payments by *the criminal* or, failing that, by the government." Gross, *supra* note 66, at 139 (emphasis added).

87 The California referendum, for example, effectively abolished the right to bail in non-capital cases, CAL. CONST. art. I, §§ 12, 28(c), attempted to abolish the fourth and fifth amendment exclusionary rules, *id.* at art. I, § 28(d), increased minimum mandatory sentences, *see, e.g.*, CAL. PENAL CODE § 667 (West 1982), and attempted to abolish plea bargaining, *id.* at § 1192.7. The act also requires restitution to victims, CAL. CONST. art. I, § 28(b), provides for victim participation at sentencing hearings, CAL. PENAL CODE § 1191.1 (West 1982), and allows victims to oppose parole of offenders, *id.* at § 3043 (adult offenders), CAL. WELF. & INST. CODE § 1767 (West 1982) (juvenile offenders). These changes seem to reflect reforms advocated by conservatives. *See* note 66 *supra*.

88 Hans von Hentig is usually credited with founding this subspecialty in H. VON HENTIG, THE CRIMINAL AND HIS VICTIM: STUDIES IN THE SOCIOBIOLOGY OF CRIME (1948). *See also* S. SCHAFER, THE VICTIM AND HIS CRIMINAL: A STUDY IN FUNCTIONAL RESPONSIBILITY 39–59 (1968). *See generally* VICTIMOLOGY (I. Drapkin & E. Viano eds. 1974). The victimologists now have their own scholarly journal entitled *Victimology*.

89 Explicitly recognizing the relative lack of psychological studies of the conse-

on sociological questions—for example, who is likely to be victimized, what is the incidence of victimization, and what are the outcomes of social services for victims. Thus, while we may *assume* many things about crime victims, few of us *know* much about the experience and its effects.

It is difficult to assign any role to victims in our criminal system without some appreciation of the experience of the victim and the psychological consequences of victimization for the individual. This part proposes a unifying theory of the individual experience of victimization as it relates to the individual[90] and discusses the psychological effect of violent crime[91] on victims as a result of the victims' sudden confrontation with the existential issues of mortality, meaning, responsibility, and isolation.[92] If this theory is correct, and recent research supports many of its propositions,[93] it indicates that many current victim's rights pro-

---

quences of victimization, the *Journal of Social Issues* has published one symposium on the effects of various types of victimization, *see Symposium, Reactions to Victimization*, 39 J. Soc. Issues 1-227 (1983), and another exclusively addressing the effects of criminal victimization, *see Symposium, Criminal Victimization*, 40 J. Soc. Issues 1-115 (1984); *see also* Fischer, *A Phenomenological Study of Being Criminally Victimized: Contributions and Constraints of Qualitative Research*, 40 J. Soc. Issues 161 (we know more about reported fear of crime and indices of fear than experience of victimization); Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974) (literature on rape provides little information on physical and psychological effects of rape).

90. The basic theory this piece proposes is not original, but rather follows closely the concepts and analysis developed by Dr. Irvin Yalom. *See* I. Yalom, Existential Psychotherapy (1980); *see also* R. May, Discovery of Being: Writings in Existential Psychology (1983); R. May, Power and Innocence: A Search for the Sources of Violence (1978) [hereinafter cited as R. May, Power]; R. May, The Meaning of Anxiety (rev. ed. 1977); R. May, Man's Search for Himself (1953); R. May, Love and Will (1969); B. Bettelheim, Surviving and Other Essays (1979); V. Frankl, Man's Search for Meaning (3d ed. 1984); K. Erikson, Everything in Its Path (1976).

91. Throughout the piece, I will discuss only the effects of "core" crimes on victims, because the effects of other crimes are unlikely to be as severe in most instances and because the victims of core crimes provide the symbol that gives force to the entire victim's rights movement.

92. Objective writing does not, and perhaps cannot, capture the nature of experiences relating to death, meaning, freedom and responsibility, and existential isolation as well as perhaps fiction or poetry can. What follows is an effort to sketch a simple analytical framework, rather than an effort to impart a complete understanding of these issues.

93. *See, e.g.*, Burgess & Holstrom, *supra* note 89 (rape victims experience acute stress reaction to life-threatening situation; fear of death is the primary component of the experience of rape); Janoff-Bulman & Frieze, *A Theoretical Perspective for Understanding Reactions to Victimization*, 39 J. Soc. Issues 1 (1983) (studies indicate that victimization causes the destruction of the assumption of invulnerability and the loss of a sense of meaning and of control); Silver, Boon & Stones, *Searching for Meaning in Misfortune: Mak-*

posals are problematic at best and may actually be psychologically destructive to the victim.

For many years mental health professionals assumed that psychological disturbances experienced by victims of disasters had their source, in part, in the individual's preexisting emotional pathology.[94] But studies of prisoners of war,[95] survivors of the Holocaust,[96] and victims of "natural" disasters[97] indicate that this assumption is inaccurate.[98] These studies of victims are particu-

---

ing Sense of Incest, 39 J. Soc. Issues 81 (1983) (studying whether finding meaning aided incest victims in coping with experience).

94. *See* K. Erikson, *supra* note 90, at 184. This assumption persists to some extent today. The *Diagnostic and Statistical Manual* of the American Psychiatric Association notes that "Post-Traumatic Stress Disorders" caused by severe trauma are influenced by prior adjustment: "[P]reexisting psychopathology apparently predisposes to the development of the disorder." 3 American Psychiatric Association, Diagnostic and Statistical Manual 237 (1980). But this somewhat glib conclusion has been contradicted by some prominent psychiatrists. Bettelheim, for example, rejects the hypothesis that reactions to extreme trauma are necessarily defined by preexisting emotional problems. B. Bettelheim, *supra* note 90, at 28-35. And the evidence from studies of Vietnam veterans suffering from the disorder is inconclusive as well. *See* M. MacPherson, Long Time Passing: Viet Nam and the Haunted Generation 192-93, 197-207 (1984); *see also* Evans, *More Vietnam Veterans Are Turning to Therapy*, N.Y. Times, Nov. 13, 1984, at C1, col. 1 (American psychiatrists refused to believe that Post-Traumatic Stress Disorder existed at all for a long time, despite studies and speculation dating back to World War I that war and other catastrophes leave deep traumatic scars).

95. *See, e.g.*, R. Lifton, Thought Reform and the Psychology of Totalism (1961) [hereinafter cited as R. Lifton, Thought Reform]; *see also* R. Lifton, Home from the War (1973).

96. *See, e.g.*, B. Bettelheim, *supra* note 90, at 24-33, 105-11. By making the comparison and noting the similarities, I do not wish in any way to trivialize the monstrous horror of the death camps, nor the long-lasting consequences of the camp experience for survivors.

97. Kai Erikson's study of the effects of a flood that destroyed several small towns in West Virginia and killed many people contains the same themes as do other studies of extreme experiences. *See* K. Erikson, *supra* note 90. Accounts of other forms of disaster—no matter how relatively horrifying to outsiders—also reflect reactions of loss, grief, fear, and disorientation in the aftermath of the experience. *See* R. Lifton, History and Human Survival 117-94 (1970) (detailing reactions of Hiroshima survivors); Quanstrom, *Burning Memories*, San Jose Mercury News, Sept. 26, 1983, at 1A, col. 3 (detailing reactions of neighborhood in San Diego, California, five years after a jet crashed).

98. In some instances, prior experiences do impede recovery from a disaster. When an individual "has undergone too severe or too frequent early traumatic experiences" and later experiences sudden and severe trauma, recovery from the later experience may be extremely difficult. *See* F. Fromm-Reichman, Psychoanalysis and Psychotherapy 93-94 (1959). But even "normal" people depend on dissociation of traumatic events to master their existence. *Id.* Although a recent study of rape victims indicated that pre-assault psychological symptoms were the most likely predictors for long-term retention of symptoms, the relationship diminished over time. Sales, Baum & Shore, *Victim Readjustment Following Assault*, 40 J. Soc. Issues 117, 122-23 (1984). Moreover, the authors found that other variables influenced manifestations of symptoms at

larly relevant because the recent literature on rape indicates a degree of common experience between rape victims and other disaster victims.[99] Anecdotal evidence[100] and other studies[101] also suggest that a similar community of experience exists among victims of other crimes.

A. *Psychological Issues Raised by Victimization*

Sudden victimization can lead to extreme trauma.[102] Kai Erikson has defined extreme trauma as "an assault on the person so sudden and so explosive that it smashes through one's defenses and does damage to the sensitive tissues underneath."[103] What I term the "core crimes" of homicide, rape, kidnapping, robbery, and aggravated assault are the crimes feared most; the effects of these crimes on individuals would appear to fall within the definition of extreme trauma. Core crimes threaten our existence,

various times. *Id.* at 129. *Cf.* R. Lifton, Thought Reform, *supra* note 95, at 86 (personal responses, while similar, depended "largely upon" character traits, "emotions and identities developed within [the person] during . . . entire previous life"); Lyons, *supra* note 94, at 21, col. 1 (Veterans Administration estimates that 350,000 to 400,000 Vietnam veterans suffer from disorder in some form; "every patient is different").

99. *Compare* Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 Am. J. Psychiatry 408 (1976) (rape is traumatic external event that breaks balance of ego adaptation and environment, resulting in guilt, phobic reactions, anxiety, and depression) *with* K. Erikson, *supra* note 90, at 156-57 (medical terms for conditions present in 91% of flood survivors include depression, anxiety, phobia, post-traumatic neurosis; Erikson's terms include confusion, despair, hopelessness).

100. Strikingly common themes run through confidential conversations that I have had with crime victims and their families. Although each person with whom I have talked has had various behavioral responses to the crime and its aftermath, all of these people experienced feelings of fear, anxiety, and loss of security or control. Many have asked why they were victimized; those who have not explicitly asked "why," devised their own explanations for their victimization. Most have attempted to find some meaning in the event, whether by blaming themselves or by searching elsewhere. A few have become totally isolated from others. But all have limited their activities in one way or another.

101. The sexual assault victims with whom I have spoken experienced reactions similar to those reported in formal studies. Some of the victims had specific fear reactions to the location of the assault, and others experienced a more generalized fear reaction. All but one had moved from the area where the assault had taken place. Similar reactions were found by Scheppele and Bart. Scheppele & Bart, *Through Women's Eyes: Defining Danger in the Wake of Sexual Assault*, 39 J. Soc. Issues 63 (1983). *See generally* K. Erikson, *supra* note 90; Metzger, *It Is Always the Woman Who Is Raped*, 133 Am. J. Psychiatry 405 (1976); Magnuson, *Crime Victim Aid Plan Suffering From Neglect*, San Francisco Chron., Oct. 17, 1983, at 1, col. 5 (statements by assault, mugging, and rape victims about experiences); *Rape*, Stanford Campus Report, Jan. 27, 1982, at 5 (anonymous interviews with two victims of sexual assaults).

102. B. Bettelheim, *supra* note 90, at 28.

103. K. Erikson, *supra* note 90, at 253.

either literally, as in homicide, or indirectly, as in assault, and remind us of the fragility of life. The intrusiveness of these crimes threatens and denies a victim's "personhood," subjecting the victim to devastating psychological consequences. In short, these violent crimes create an "urgent experience that propel[s] one into a confrontation with one's existential 'situation' in the world."[104] The more extreme the experience, the more likely the resulting psychic damage.[105] The crimes of robbery, rape, kidnapping, and attempted murder directly force victims to confront their own mortality, an experience that "has the power to provide a massive shift in the way one lives in the world."[106]

The terror of death, however, "is of such magnitude that a considerable portion of one's life energy is consumed in the denial of death."[107] Thus, many people engage in "death denial"—the belief by an individual that while others can die, he or she is immune to death.[108] In the context of criminal victimization, this

104. I. Yalom, *supra* note 90, at 159.

105. Bettelheim has observed that the worst situation for an individual is "[w]hen we are abandoned and immediate death is possible and likely . . . . Then the effects are catastrophic. The combined sudden breakdown of all . . . defenses against death anxiety projects us into . . . an *extreme situation*." B. Bettelheim, *supra* note 90, at 11 (emphasis in original). In his study of Westerners imprisoned by the Chinese and subjected to "thought reform," Lifton found that four years after the experience, "my subjects still bore marks of both fear and relief. The fear was related to . . . the fear of total annihilation." R. Lifton, Thought Reform, *supra* note 95, at 208.

106. I. Yalom, *supra* note 90, at 159. Studies of the impact of near-death experiences have not concentrated as much on victims of violent crime as they have on accident victims, unsuccessful suicides, and people with terminal illnesses. Some of these studies indicate that *positive* changes may result from the experience—that realization of the precious nature of life may sharpen one's awareness, *see id.* at 33-38, result in a change in priorities, and lead to enhanced relationships with others, *id.* at 35. This may not be as true for crime victims, however. A failure of crime victims to benefit from their confrontation with death may be an effect of being labelled a "victim," or may be a result of a lack—caused by society's intense ambivalence toward crime victims—of any social support. *See* notes 139-147 *infra*. Whether crime victims experience an enhanced appreciation for life because of their confrontation with death is an open question at this time.

107. I. Yalom, *supra* note 90, at 41.

108. *See* Perloff, *Perceptions of Vulnerability to Victimization*, 39 J. Soc. Issues 41 (1983) (nonvictims tend to underestimate likelihood or frequency of negative life events and appear to maintain illusion of unique invulnerability). Dr. Yalom borrows from Tolstoy's *Death of Ivan Ilych* to illustrate the belief in special protection from death and harm:

> The syllogism he had learnt from Kiesewetter's Logic: "Caius is a man, men are mortal, therefore Caius is mortal," had always seemed to him correct as applied to Caius, but certainly not as applied to himself. That Caius—man in the abstract—was mortal, was perfectly correct, but he was not Caius, not an abstract man, but a creature quite, quite separate from all others. . . . It cannot be that I ought to die. That would be too terrible.

I. Yalom, *supra* note 90, at 117-18 (*quoting* L. Tolstoy, The Death of Ivan Ilych and Other Stories 131-32 (1960)).

denial is related to the belief that although violent crime happens to others, it won't happen to oneself. Actual victimization shatters these assumptions, and the lack of control that a victim feels during an assault deprives her not only of her belief in invulnerability, but also of her sense of control and autonomy in the world.[109] In this way, victimization forces individuals to confront their own mortality, but because people cannot sustain the experience of pure death anxiety for long, the anxiety may be displaced, denied, or repressed.[110] As a result, fear of revictimization,[111] feelings of helplessness,[112] loss of a sense of control over one's destiny, and lack of security[113] become "typical" reactions to an intrusive confrontation with death. Indeed, survivors of disasters may conclude that life owes them something,[114] or may commit suicide in response to death anxiety.[115] And victims of violent crime respond similarly.[116]

109. Scheppele and Bart found that women who had followed "the rules of rape avoidance" were more likely to have severe reactions to the assault than those who knew that they were in a dangerous situation at the time of the attack. To be assaulted when one has taken all appropriate measures to avoid assault is a horrifying reminder that one is not in control of one's fate. Scheppele & Bart, *supra* note 101, at 76–78. The severity of the reaction to being attacked in "safe circumstances" is related to the loss of control, not just of the attack itself, "but for the future as well." *Id.* at 79. Peterson and Seligman suggest that criminal victimization may increase feelings of helplessness or reinforce already existing learned helplessness, for "when uncontrollable bad events *precede* helpless behavior, and when the helpless individual expects future responding to be futile, it may well be that learned helplessness is operative." Peterson & Seligman, *Learned Helplessness and Victimization*, 39 J. Soc. Issues 103, 107 (1983).

110. *See* R. Lifton, Thought Reform, *supra* note 95, at 148–49 (apparent resisters to thought reform used denial and repression as coping strategies); *see also* I. Yalom, *supra* note 90, at 11–15.

111. *See* Kilpatrick, *Brief Psychotherapy with Victims of Violent Crime*, 5 Victimology 317, 318 (1980). Once the illusion of invulnerability is shattered by an assault, victims may even overestimate the likelihood of another assault. Tyler, *Assessing the Risk of Crime Victimization: The Integration of Personal Victimization*, 40 J. Soc. Issues 27, 45 (1984).

112. *See* Peterson & Seligman, *supra* note 109.

113. *See* Scheppele & Bart, *supra* note 101.

114. *See* C. Silverman, *supra* note 29, at 19–21.

115. Suicide paradoxically "relieves" death anxiety by giving the individual ultimate control over his or her own death. I. Yalom, *supra* note 90, at 122, 197–99. Numerous rape victims, Vietnam veterans, and survivors of Hiroshima have responded to their victimization with suicide attempts or successful suicides. *See, e.g.*, T. Beneke, Men on Rape 164 (1982) (suicide attempts by rape victims are not uncommon); M. MacPherson, *supra* note 94, at 230 (detailing suicide rates of Vietnam veterans); R. Lifton, *supra* note 97, at 117–94 (discussing suicide as a response to the nuclear attack on Hiroshima); *see also* Stipp, *Cancer Threat Seen for Vietnam Vets in Study of Deaths*, Wall St. J., Jan. 29, 1985, at 42, col. 6 (suicide rate among Vietnam veterans in Massachusetts is 58% above the expected rate).

116. One recent study of 91 sexual assault victims found that 91% of women who

Victimization can also lead to a shift in psychological perspective from believing that one is "at home in the world" to believing that the world is a frightening or indifferent place. This shift is closely linked to the confrontation with one's own mortality, and ultimate—and inevitable—isolation from others.[117] The experience of being a victim makes all things and all other people seem unfamiliar and frightening. This unfamiliarity creates a sense of "dread"—and a feeling of nothingness—that is horrifying and objectively indescribable.[118] The support of friends and relatives may help to mitigate a victim's sense of dread and isolation by helping the victim begin to feel secure in the world again. But to feel at home in the world, to dispel dread, the victim may also seek to find meaning in the experience.

The question "for what?"[119] exemplifies the search for the meaning of existence that in turn allays death anxiety. Because "death anxiety frequently masquerade[s] as meaninglessness,"[120] victims will often try to come to terms with their own mortality by attempting to find meaning in their victimization or in life itself.

But noninstrumental violence is terrifying precisely because it has no apparent meaning in the ordinary sense of reason or justification. "Why?" or "Why me?" are questions associated with meaning that victims frequently ask of themselves and others.[121]

were raped in a "safe situation"—at home with the doors locked, for example—suffered from either a "diffuse" fear reaction—a view of numerous situations as dangerous—or a "total fear" reaction—a life characterized by constant "almost [illegible]able" fear. Scheppele & Bart, *supra* note 101, at 78. These extreme reactions are not surprising given the intrusiveness of the crimes described; such an invasion could easily shatter the victim's illusion of invulnerability and her confidence in her ability to control life.

It is not atypical for a victim of a sexual assault to state, "I wish he'd killed me . . . [illegible] if it happens again, I hope I die." *See* S. Brownmiller, *supra* note 14, at 106; *see also* Frazier & Borgida, *Rape Trauma Evidence in Court*, 40 Am. Psych. 984, 990 (1985) (a recent survey found sexual assault victims five times as likely to attempt suicide as nonvictims); Dowd, *Rape: The Sexual Weapon*, Time, Sep. 5, 1983, at 27, 28 ("Studies show that . . . suicide attempts are fairly common after rape.").

117. *See* I. Yalom, *supra* note 90, at 356.

118. *Id.* at 43. This form of dread—of fear of nothingness—causes the world to become foreign. It is a sensation of falling, of not perceiving, of being lost. It is more than anxiety or panic in the classic meaning of those words; it is, indeed, dread.

119. P. Tillich, The Courage To Be 111 (1952). Tillich sees death and meaning as separate existential issues, but acknowledges that the question of life's meaning is related to the consciousness of mortality. *Id.* at 170. *See also* B. Bettelheim, *supra* note 90, at 4.

120. I. Yalom, *supra* note 90, at 166.

121. The questions asked by the crime victim may range from the simplest inquiries to the anguished cry of Job. They may transcend causal explanations or attributions, encompassing the search for life's ultimate meaning. Human suffering seems to demand

Crime victims may seek meaning to their victimization either retrospectively by blaming themselves or others,[122] or prospectively by collapsing into helplessness,[123] feeling a duty to help other victims,[124] devoting themselves to remedying an evil,[125] or seeking to live their lives more constructively.[126] But making assumptions about victims based on their initial attributions of meaning to the event is difficult, because an individual's attribution of meaning to an event may change over time:[127] A meaning that was once adequate to explain the event may be inadequate in

an explanation and, as Frankl observes, a victim's search for meaning in the aftermath of the event may operate at two levels. On one level is a search for meaning in one's own suffering; on the other level is a search for meaning to human suffering in general. V. Frankl, *supra* note 90, at 178–88. Not all victims consciously pursue meaning, however. *See* Silver, Boon & Stones, *supra* note 93, at 94.

122. Most commonly, victims will blame the perpetrator, but they also frequently blame the police for failing to protect them and blame society for creating the circumstances leading to the crime.

If the word "attribution" is substituted for "blame," the questions of meaning become more apparent. *See* Miller & Porter, *Self Blame in Victims of Violence*, 39 J. Soc. Issues 139 (1983) (self blame is defined as attribution; control and meaning are supplied for victims through attribution).

123. *See* Peterson & Seligman, *supra* note 109.

124. John Walsh, the father of a boy who was abducted and murdered in 1981, has worked diligently and successfully to publicize the need for effective law enforcement in locating missing children and to obtain federal support for a national system for locating abducted children. *See* Anderson, *Missing Children's Center Gets Funding*, San Jose Mercury News, Apr. 19, 1984, at 2A, col. 5. Many rape victims eventually become involved with rape crisis counseling. Moreover, one of the factors motivating the founders of Mothers Against Drunk Driving was a desire to help families of victims.

125. Although much publicity has been given to Mothers Against Drunk Driving and their "tough" policies against drunk driving, some relatives of victims may choose to remedy what they perceive to be a greater evil. The daughter-in-law of a homicide victim, for example, chose to start a group to oppose the death penalty because "[w]e simply wanted to prevent violence from being added to violence." *See* Deans, *Murder Most Foul, But Vengeance Kills the Soul*, San Jose Mercury News, July 17, 1984, at 1C, col. 1.

126. A near death experience can result in a reorganization of priorities and a desire to concentrate on what one finds to be meaningful. *See* I. Yalom, *supra* note 90, at 33–35. Occasionally, however, crime victims will identify with the aggressor and court danger or enter a criminal life. Scheppele & Bart, *supra* note 101, at 71 (one rape victim became a prostitute, thief, and drug abuser; another carried a knife and "became promiscuous"). The case of Patricia Hearst, who was kidnapped, tortured, and raped, only to be convicted of armed robbery, may be the most widely known example of the phenomenon of identifying with the aggressor. Ideologically the "perfect" victim symbol, Ms. Hearst received remarkably little sympathy for her plight.

127. Just as with other traumatic events, such as the loss of a significant and loved other person, there are stages of recovery and reintegration. *See* Burgess & Holmstrom, *supra* note 89, at 981, 982–83 (1974) (acute phase during first several weeks after sexual assault; long term reorganization took place at different rates for different victims); *see also* B. Bettelheim, *supra* note 90, at 36 ("Personal integration . . . and with it achievement of meaning . . . is a highly individual, lifelong struggle.").

light of new experiences or reflection. Finding some meaning, however, is important in helping an individual understand and accept even the most extreme experiences.[128]

Taking individual responsibility for the experience may help the victim to find meaning, because responsibility, if defined as the choosing or creating of one's experiences,[129] is related to meaning and autonomy in life. Responsibility in this sense means being "the uncontested author of an event or a thing,"[130] and "[t]o be aware of responsibility is to be aware of creating one's own self, destiny, life predicament, feelings, and . . . one's own suffering."[131] How a person perceives and defines an event, a thing, or another person, ultimately depends on his or her awareness of responsibility or authorship.[132]

Assuming responsibility for a traumatic experience is a process requiring an assertion or reassertion of control in one's life. Responsibility initially requires an individual to accept that the criminal event occurred. But a frequent first reaction to traumatic experience is a denial that the event occurred at all, in part to avoid the death anxiety produced, but also in part to avoid

128. B. Bettelheim, *supra* note 90, at 34–35; V. Frankl, *supra* note 90, at 121–23. A study of father-daughter incest victims found that, even after an average time of twenty years since the crime, over 80% of the victims responding stated that they were still searching for an understanding of the experience. *See* Silver, Boon & Stones, *supra* note 93, at 91. Those victims who had found at least some meaning coped with life significantly better than those who could not find any meaning. *Id.* at 93, even though the search for meaning might not have produced a totally sufficient explanation for them.

129. *See* I. Yalom, *supra* note 90, at 218–21.

130. J.P. Sartre, Being and Nothingness 633 (1956).

131. I. Yalom, *supra* note 90, at 218. Dr. Yalom adopts Sartre's definition. *Id.* In a section titled "Responsibility Awareness American Style—Or, How to Take Charge of Your Own Life, Pull Your Own Strings, Take Care of Number One, and Get It," Yalom quotes an exchange between an EST (Erhard Sensitivity Training) trainer and a participant that illustrates "that one is responsible for being mugged." *Id.* at 250:

EVERYTHING THAT YOU EXPERIENCE DOESN'T EXIST UNLESS YOU EXPERIENCE IT. EVERYTHING A LIVING CREATURE EXPERIENCES IS CREATED UNIQUELY BY THAT LIVING CREATURE WHO IS THE SOLE SOURCE OF THAT EXPERIENCE. WAKE UP, HANK.

Id. at 257 (quoting L. Rhinehart, The Book of EST 142–43 (1976) (emphasis in original)).

132. While this concept of responsibility sounds very abstract, it actually exists even at an everyday level. You see a friend on the street, you smile and say hello, but the friend does not acknowledge you. You respond by deciding that the friend is angry with you or did not notice you, or is preoccupied. *How* you saw the friend was a matter of choice. You may have missed her sad expression or failed to see that she was looking in another direction.

111

acknowledgement that such a horrible thing could be a part of life.[133] Yet until the victim acknowledges the actual experience as hers or his alone—that *she* was raped, that *he* was mugged—the victim is virtually powerless to be free from the rapist or the mugger,[134] or to take responsibility for, and thereby reassert control over, the event and the direction of her or his life.[135]

Unfortunately for many crime victims, American culture discourages this kind of personal responsibility and instead emphasizes another type of responsibility—"blame" and fault finding. By blaming others, the victim escapes responsibility. By blaming the victim for his plight,[136] society further discourages the victim from taking responsibility for the event. Accordingly, the societal emphasis on innocence as a prerequisite to being a "real" victim, taken in combination with the confusion between "innocence" and "responsibility,"[137] make it very difficult for a victim to avoid displacing the criminal event from her experience. Moreover, the inability of other people, even those close to the victim, to accept the crime victim's experience can further isolate the victim

---

133 Burgess & Holstrom, *Coping Behavior of the Rape Victim*, 133 AM. J. PSYCHIATRY 413, 416 (1976) (some women denied the event, some dissociated the experience, some suppressed it). One sexual assault victim captured this phenomenon perfectly: "You don't want to believe it happened. . . . It's so unreal that you don't want to believe it happened or that it can happen." *Rape*, *supra* note 101, at 5, col. 3.

134 *See* note 131 *supra*.

135 Robert Lifton's formulation of responsibility postulates that adjustment occurs in three phases. The first is "confrontation," a recognition of the impact of extraordinary forces and of the potential for choice. The second is "reordering," an exploration of existential guilt and a testing of new ideas and behaviors. The third is "renewal," the choice of an ideological path. R. LIFTON, THE BROKEN CONNECTION 155 (1976). Blaming victims for their plight tends to make them feel guilty. The trap of blame and guilt creates a bond between the victim and the event that may come to dominate the victim's life, making it impossible for the victim to live independent of the criminal event. *See* notes 268–275 *infra* and accompanying text.

137 In discussing innocence, Rollo May distinguishes between two kinds of innocence. One is "authentic innocence"—"a quality of imagination. . . . [F]rom this innocence spring awe and wonder. . . . It is the preservation of childlike attitudes into maturity without sacrificing the realism of one's perception of evil, or as Arthur Miller puts it, one's 'complicity with evil.'" R. MAY, POWER, *supra* note 90, at 18–19. Navette characterizes "pseudoinnocence," the second kind of innocence: "It is childishness rather than childlikeness . . . [which leads us to] make a virtue of powerlessness, weakness, and helplessness." *Id.* at 19. This second form of innocence is a defense against responsibility. *Id.* at 63–64. To May, pseudoinnocence is a profound problem in American culture. *Id.* at 50, 56–57. To emphasize this form of innocence may be to discourage crime victims from taking responsibility for their experiences and lives and to encourage them to engage in ultimately self-defeating attitudes of helplessness, powerlessness, denial, or repression.

from the experience, thereby blocking successful resolution of the crisis.[138]

Victims frequently encounter social isolation and an invalidation of their efforts to come to terms with their experience, while at the same time confronting the existential isolation presented by the reality of death.[139] Experiencing a violent crime—confronting one's own death—powerfully reminds the individual that he or she is alone. Although others may commiserate or empathize, they cannot negate the reality of the event.[140] But friends, relatives, and others can help a victim to escape the dread of isolation. Simply because victims are isolated at one level does not mean that relationships with others are not fundamentally important for them. Indeed, it may be just the opposite: A sense of relatedness—of belonging to a larger community, of still *being*—may be essential to recovery.[141] As Buber observed, "[a] great relationship breaches the barriers of a lofty solitude, subdues its strict law, and throws a bridge from self-being across the abyss of dread of the universe."[142] The inability of friends and relatives of victims to confront the issues raised by victimization—either by "blaming the victim,"[143] minimizing the event,[144]

---

138 If the victim becomes a stereotype, an "it," to other people, the potential for relationship is negated, the victim becomes objectified, and relationship of the kind that mitigates isolation is precluded.

139 *See* J. YALOM, *supra* note 90, at 353.

140 *Id.* at 356. It may be the common wisdom that "the one thing that victims of crime would cherish most . . . to somehow wipe out the moment when assailant and victim came together, to turn back the clock 10 seconds before the crime and allow the victim to walk away. . . ." Greene, *A Violent Stranger Becomes a Lifelong Companion*, San Jose Mercury News, May 7, 1984, at 11B, col. 3. But ultimately victims cannot be free from the assault until they acknowledge that it happened.

141 "Being" is both internally and externally defined. J.P. SARTRE, *supra* note 130, at 303. Even the hermit, who eschews human contact, relates to his environment and thereby realizes his existence.

142 M. BUBER, BETWEEN MAN AND MAN 11 (1965).

143 *See generally* W. RYAN, *supra* note 136 (describing American proclivity for blaming victims for their misfortunes). Blaming victims may serve a protective function for others. If one can perceive a difference between a victim and oneself, it may be possible to maintain one's own illusion of invulnerability. A concrete example of this phenomenon appears in the book *The Onion Field*, which chronicles the kidnapping of two police officers, one of whom was murdered. The victims were blamed officially and indirectly for their fate. J. WAMBAUGH, THE ONION FIELD 295–41, 368–72 (1973).

144 In a perhaps misguided effort to console a person who has been victimized, friends or relatives frequently make such remarks as "it could have been worse," "at least you're alive," "at least they caught the guy," or "it's over with, you're safe now." These statements are less than comforting when one realizes the nature of severe trauma. *See* Coates & Winston, *Counteracting the Dynamics of Depression: Peer Support Groups*

or by withdrawing from the victim's distress[115]—may deprive the victim of the reassurance of relationship to others. Frequently, like Job's comforters, we are not content simply to console or to provide victims with the connection to others that they need. Rather, we tell the victim what the victim should feel or think, or we blame the victim for his or her plight. In part, nonvictims tend to blame victims, misunderstand the particular experience of victims, and expect victims to return to their "old selves" quickly in order to protect themselves from perceived threats to their own sense of invulnerability.[116] Even if members of the victim's family or community are initially responsive and supportive, tolerance for a victim's feelings of loss, anger, fear, or meaninglessness is likely to wane long before the victim has time to begin to integrate the experience.[117]

Answers to the questions of death, meaning, responsibility, and isolation vary from individual to individual, just as behavioral and psychological manifestations of these existential issues differ from victim to victim.[118] And these questions do not follow each other in the orderly way in which this discussion has presented them. They merge, overlap, and differ in saliency at particular times. The issues of victimization seldom manifest themselves clearly as "death anxiety" or crisis of meaning: Anger, fear, frustration, loss, grief, confusion, and guilt are feelings that may relate to or mask these issues, and the underlying issues may take years to express or understand.

B. *The Implications of the Theory*

Common assumptions about crime victims—that they are all "outraged" and want revenge and tougher law enforcement—

[illegible] Victims, 39 J. Soc. Issues 169, 171-75 (1983) (summary of studies of reactions of nonvictims to victims).

115. *Id.* Our culture places a great emphasis on "happiness" and the absence of distress. Seeing another's distress makes us uncomfortable, so we often withdraw contact.

116. *See* notes 108-109 *supra* and accompanying text.

117. Coates & Winston, *supra* note 111, at 175 ("It would appear, then, that when victims fail to quickly 'snap out of it,' others try to enforce standards indicating they should do so.").

118. Given the profound nature of the experiences of victims, it would be foolish to say that there is one "right" way to cope with the experience. Although some generalizations about the effect of extreme trauma on individuals are possible, the resolution of the crisis depends on an infinite number of external and internal variables influencing the individual. Moreover, as Bettelheim observes, "[a] survivor has every right to choose his very own way of trying to cope." B. Bettelheim, *supra* note 90, at 37.

underlie much of the current victim's rights rhetoric.[149] But in light of the existing psychological evidence, these assumptions fail to address the experience and real needs of past victims. The theoretical outline just presented speaks to the experience of being a past victim; the prospect of becoming a past victim as the concern of society is evidenced by the concern for future victims. In this way, violent crime touches all of us with the reality of the unpredictable, the threat of death, the dilemma of meaning, the responsibility for choice, and the reality of isolation. To the extent that we examine these issues of our own accord—to the extent that resolution comes through more voluntary reflection and experience—the concern for future victims is very different than that for past victims. For future victims, we can seek to prevent the experience, but for past victims, the experience is already a reality. For past victims, we can only seek to avoid interfering with or denying the individual victim's efforts to resolve these questions.

While questions of existence rarely manifest themselves in a pure, abstract form, the issues are nevertheless unavoidably present for all victims at some level. Past victimization catapults individuals beyond what nonvictims or future victims can know; the ontological rules change. What is "good" for future victims—the prevention of harm, the diminution of evil—is no longer applicable to past victims, who, for at least an instant, have seen the abyss. The rape victim who becomes hysterical soon after police arrive provides an illustration of this tension: Hysteria may be a necessary release of tension and an affirmation of being for someone who has just seen the prospect of nonbeing.[150] But in the interests of future victims—apprehension of the culprit before he creates more damage and punishment of the guilty—the police necessarily seek rationality, information, and evidence.

A victim's contact with the criminal justice system may hinder him or her from coming to grips with death, meaning, responsi-

149. *See* notes 70-71 *supra*, 266-267 *infra* and accompanying texts.

150. Ironically, the hysterical reaction is the one most likely to give the victim credibility in the eyes of the police. Although a lack of a perceptible response or affect is not unusual, it may lead the police to believe no crime occurred. *See* Berger, *supra* note 68, at 23-24 & n.150; *see also* Burgess & Holmstrom, *supra* note 89, at 982 (discussing two forms of immediate emotional response to rape: one, "the expressed style, in which feelings of fear, anger, and anxiety were shown through such behavior as crying, sobbing, smiling, restlessness, and tenseness"; the other, "the controlled style, in which feelings were masked or hidden and a calm, composed, or subdued affect was seen."

bility, and isolation in innumerable ways. The criminal justice system provides a ready set of opportunities for blame and denial, proceeds on the basis of mistaken normative assumptions about victims, and emphasizes rationality—or the appearance of it.[151] To be of value to past victims of core crimes, victim's rights proposals ideally ought to assist, rather than interfere with, the victim's resolution of the experience. The remainder of this article examines the meaning of victim's rights proposals in light of both traditional legal thinking and the existential nature of victimization. Of course, the criminal justice system cannot ultimately answer the individual's questions of death, meaning, and responsibility because its focus is on the event itself; its concern is with the narrower issues of identifying the offender and determining legal responsibility. But insofar as the isolation of past victims is concerned, the criminal justice system may provide a social context in which some meaningful "connection" for the victim exists. Whether or not "victim's rights" provides this connection will be a central part of the remaining inquiry.

III. A COMPOSITE OF VICTIM'S RIGHTS PROPOSALS

One persistent image of the American criminal process is that it "revictimizes" the victim. The President's Task Force *Final Report*,[152] for example, portrays the ill-treatment of crime victims in a particularly apocryphal story. The *Final Report* describes the insensitive treatment of a widowed 50-year-old rape victim by the police and hospital personnel. It then details the numerous abuses that the criminal justice system inflicted upon the victim, including an indifferent and ineffective attempt at preventing threatening phone calls to the victim by her attacker from jail, an inconvenient scheduling of line-ups, unethical activities by de-

151. One study of assault and robbery victims in Brooklyn and Newark found that the motivations of victims differed from the goals of the criminal process and that victims were often dissatisfied with the performance of prosecutors, judges, and police. R. Davis *supra* note 72, at 83–110. Twenty percent of those surveyed had negative feelings toward the "system" that manifested a transfer of blame. Typical comments included "The law doesn't protect the citizen," and "I'm frustrated. I won't deal with the . . . system anymore. Next time I'll just kill him and when they take me to court I'm going to tell the judge that I want the same treatment as this guy got!" *Id.* at 131. Although many of the victims surveyed saw a need for better law enforcement or stricter sentencing, 26% had no suggestion for improving the situation for future crime victims because they were apparently satisfied with the way in which their cases were handled. *Id.* at 135.

152. Task Force, *supra* note 71.

fense counsel, repeated failures by the prosecutor to inform the victim about her role in hearings and the trial and to promptly notify her about postponements, the emotional and financial burden of delays in the process on the victim, the enormous pressure and humiliation of testifying, and the short sentence that was eventually imposed on the rapist.[153]

The scenario presented in the *Final Report* is indeed horrifying. It is also somewhat incredible to anyone acquainted with criminal law practice, and it is insulting to judges, prosecutors, defense attorneys, and law enforcement officers. It is a composite of everything that could go wrong in the process, rather than a chronicle of an actual case.[154] Yet the scenario presented in the *Final Report*, and other horror stories like it, have led to numerous victim's rights proposals that purport to remedy the situation.[155] These proposals typically contain one or more of the following elements:

(a) that the suspect remain in custody after arrest;[156]

(b) that few, if any, delays exist between arrest and preliminary hearing, and between hearing and trial;[157]

(c) that plea bargaining either be eliminated or be victim-determined;[158]

(d) that there be minimal, if any, cross-examination of victims by defense counsel;[159]

(e) that exclusionary rules be abandoned.[160]

153. *Id.* at 3–13.

154. The President's Task Force admits as much: "Based on the testimony of victims, we have drawn a composite of a victim of crime in America today." *Id.* at 3. It nonetheless asserts, however, that the composite victim "is every victim." *Id.*

155. Senator Edward Kennedy heard "horror stories of murder, rape and torture from witnesses advocating the abolition of parole in a hearing before the Senate Judiciary Committee, for example." *See Crime Victims' Agony*, San Francisco Chron., May 21, 1983, at 8, col. 1. One seldom hears from victims for whom the system has "worked." *But see* Silverberg, *My Mugging: Justice Is Done*, Newsweek, July 4, 1983, at 14 (arguing that the press may have overemphasized those instances where malfunctions in the criminal justice system have occurred).

156. *See e.g.*, Wis. Const. art. I, § 8 (1981); Task Force, *supra* note 71, at 22.

157. *See e.g.*, Task Force, *supra* note 71, at 57–68, 75–76.

158. *See e.g.*, Cal. Penal Code § 1192.7 (West 1983); R. Reed, *supra* note 25, at 111–17; Task Force, *supra* note 71, at 55–56; Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. Ill. L. Rev. 37, 90–92.

159. *See e.g.*, Task Force, *supra* note 71, at 24 (recommending that victims not be required to appear at preliminary proceedings and that hearsay testimony of police or other law enforcement officers be admissible instead).

160. *See e.g.*, Cal. Const. art. I, § 28(d); Task Force, *supra* note 71, at 24 (fourth amendment exclusionary rule only); *see also* California Legislature, Assembly Comm. on Criminal Justice, Analysis of Proposition 8, at 9–10, 14–17 (1982).

(f) that victims be allowed to participate in sentencing;[161]

(g) that victims receive full restitution.[162]

This composite portrays an "ideal" criminal process, one that more closely resembles a model produced by crime control ideology than by supporters of a program designed to spare victims unnecessary trauma.[163] Nevertheless, it may be that these proposals do in fact benefit past victims. The composite victim's rights proposal just presented has two components: One involves the process leading up to conviction, and the other involves the process of imposing sanctions. Part IV addresses the relationship of the pre-conviction component to the psychological effects of crime on victims; Part V makes a similar inquiry with regard to the sentencing component.

IV. Pre-Conviction Changes and Their Relationship to the Psychological Needs of the Victim

A. *Denial of Bail and Preventive Detention Statutes*

Although the eighth amendment's prohibition against excessive bail would seem to preclude pretrial incarceration of individuals who can pay bail,[164] the Supreme Court has declined to apply the provision to the states or to address the issue of "preventive detention" of adults.[165] "Preventive detention" is the im-

161 *See, e.g.*, note 233 *infra*.

162 *See, e.g.*, notes 315–317 *infra*.

163 *See* Brosnahan v. Brown, 32 Cal. 3d 236, 305–06 app., 651 P.2d 274, 319 app., 186 Cal. Rptr. 30, 75 app. (1982) (reprinting ballot statements); *Victim Rights Bill Fuels Get Tough Mood*, 68 A.B.A. J. 530, 530 (1982) (George Nicholson, a candidate for California attorney general and a member of a five man committee pushing the initiative, said the move is an effort to counteract liberal decisions by the California Supreme Court.").

164 As of this writing, the Supreme Court has declined to decide whether preventive detention statutes violate the eighth amendment. *See, e.g.*, Murphy v. Hunt, 455 U.S. 478 (1982) (vacated as moot); United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). *See generally* Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 928 (1982) (arguing that the historical meaning and development of a right to bail and the intent of the Framers precludes the use of preventive detention).

165 *See* note 164 *supra*. The Court did seem to approve preventive detention of juvenile offenders last term. *See* Schall v. Martin, 104 S. Ct. 2403 (1984). No suggestion of incorporating eighth amendment concerns appears in the opinion, however. Justice Rehnquist, writing for the majority, may have indicated a broader interest in preventive detention by emphasizing the existence of a "'legitimate and compelling state interest' in protecting the community from crime" while, at the same time, stating that "the harm to society may even be greater . . . given the high rate of recidivism among juveniles."

prisonment of a person *before* a formal determination of criminal culpability based on an assumption that the individual is guilty, dangerous, and should be removed from society.[166] Conservatives have supported preventive detention statutes since the Nixon era, and preventive detention can be viewed as part of the conservative support of the crime control model.[167]

Although preventive detention has slowly gained acceptance in the law, first in the area of civil commitment,[168] then by means of a specific statute adopted in the District of Columbia,[169] the rate of its acceptance has quickened because of the emergence of "victim's rights." By using both "past victim" and "future victim" rationales, conservatives have made substantial progress in formally legitimizing preventive detention.[170] Both rationales to-

Id. at 2410 (quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960)). The majority also concluded that detention of juveniles in a juvenile facility is not "punishment," *id.* at 2414, a conclusion sharply disputed by the dissenters, *id.* at 2429 (Marshall, J., dissenting).

166 These predications are characteristic of crime control ideology; *see* H. Packer, *supra* note 17, at 240–41, and of conservative ideology as well, *see, e.g.*, Bonnau, *The Selling of Preventive Detention 1970*, 65 Nw. U.L. Rev. 879, 881–84, 926–28 (1971); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223 (1969).

167 *See* Mitchell, *supra* note 166 (Nixon's Attorney General John Mitchell arguing in favor of preventive detention); *The Case for Pretrial Detention*, address by Kleindienst, ALI-ABA Midwinter Meeting (Jan. 30, 1970), *reprinted in Preventive Detention: Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 1187, 1190 (1970) [hereinafter cited as *Preventive Detention Hearings*] ("We in the Department of Justice believe that pretrial detention is essential to any serious effort to reduce crime in the District of Columbia.").

168 For example, the argument of then-Attorney General John Mitchell in support of preventive detention rested in part on an analogy to civil commitment of the mentally ill. *See* Mitchell, *supra* note 166, at 1233–34, 1241. The analogy is not entirely appropriate, however, because civil commitment is based on a treatment model rather than a punitive model. Moreover, subsequent decisions by the United States Supreme Court and other courts have required the state to prove, by at least clear and convincing evidence, dangerousness as a result of mental illness. *Compare* Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing evidence required in civil commitment proceedings), *with* Estate of Reudel, 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 121 (1979) (proof beyond a reasonable doubt required for civil commitment). In O'Connor v. Donaldson, 422 U.S. 563 (1975), the Supreme Court indicated that civil commitment of the mentally ill *without* treatment might violate the due process clause. *Id.* at 577. Thus, a purely preventive detention rationale even in the context of civil commitment, might not pass constitutional scrutiny.

169 D.C. Code Ann. § 23-1322 (Supp. 1982). The statute provides that defendants accused of crimes of violence can be detained for 60 days if the prosecution certifies that the detention will "protect the community . . . if the defendant has been convicted of a violent crime within five years of the current offense charged." *Id.*

170 Past victims who were victimized by someone released on bail are a perfect symbol of what can happen to the innocent public and are therefore used to raise fears of future victimization. The fact that some innocent people become victims of persons

cus on fear: the fear experienced by the past victim that results from his victimization and the more generalized public fear of being a future victim. In response to both fears, several states have passed preventive detention statutes.[171] Congress, having already approved preventive detention in the District of Columbia, enacted a bill in 1984 that would make the nature of the charge presumptive evidence that a defendant should be detained in all federal criminal proceedings.[172]

1. *The use of a "past victim" rationale*

Supporters of preventive detention have emphasized the fact that some offenders have threatened or harassed their victims to discourage prosecution.[173] Three immediate criticisms of this rationale exist. First, because some defendants threaten victims does not necessarily justify incarcerating all defendants. Second, little reliable data on the incidence of victim harassment presently exist.[174] Finally, incarcerating the accused does nothing to

---

released either on bail or on their own recognizance has provided ample symbolic support for pretrial detention. *See* TASK FORCE, *supra* note 71, at 22-23.

The Justice Department recently concluded that approximately 16% of offenders released on bail were rearrested for another offense while they were out of jail. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES (1981). The study does not indicate what type of offenses resulted in the rearrest of persons on bail, nor does the percentage seem significant as a raw figure. A 1970 study by the National Bureau of Standards showed that 11% of defendants released before trial in the District of Columbia were rearrested for subsequent offenses, 25% of those charged with "dangerous" crimes were rearrested for a second misdemeanor or felony, and 17% of those defendants charged with "violent" crimes who were released were rearrested for a subsequent felony or misdemeanor. Borman, *supra* note 166, at 898-99. Thus, it may not be true that most innocent victims are victimized by persons who are out of custody awaiting adjudication of serious charges. But statistics do not respond to the emotions of fear and loathing that are caused when a person released on bail is subsequently rearrested for a serious offense.

171. *See, e.g.*, CAL. CONST. art. I, § 12; MICH. CONST. art. I, § 15; WIS. CONST. art. I, § 8(3); UTAH CODE ANN. § 77-20-1 (1980).

172. Bail Reform Act of 1984, § 203, Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. § 3141 (1985)).

173. *See, e.g.*, G. DEUKMEJIAN, OF JUDGES, JUSTICE, AND CRIME VICTIMS 7-8 (1980); Graham, *Lecture: Witness Intimidation*, 12 FLA. ST. U.L. REV. 239, 239 (1984) ("[W]itness intimidation is an extremely serious obstacle in the *quest for law and order* that is only now receiving the attention which it deserves.") (emphasis added). *Cf.* TASK FORCE, *supra* note 71, at 19 (asserting that "threats and actual retaliation are not uncommon" to justify proposal that addresses of witnesses not be available to defense absent "a clear need"). Ironically, intimidation of victims and witnesses was not an issue in the debates over the enactment of the District of Columbia preventive detention statute. *See Preventive Detention*, *supra* note 167.

174. The President's Task Force asserts that "many victims and witnesses are threatened or intimidated by defendants and others," TASK FORCE, *supra* note 71, at 61, but this conclusion is based on a carefully selected and impressionistic sample. By contrast, a careful study of crime victim compensation programs in Brooklyn, New York and Newark, New Jersey, found that a total of 30% of the victims participating in the study had been threatened. However, only 19% had been threatened "sometime" after the crime had occurred; 11% were threatened at the crime scene. Moreover, 70% of the victims said that "they had never been threatened." R. ELIAS, *supra* note 72, at 90 (1983).

George Deukmejian relied on a study by the ABA Commission on Victims that found "nearly" one third of all noncooperating witnesses "cited fear of reprisal as the reason for noncooperation" to justify his conclusion that victim intimidation seriously impedes law enforcement and prosecution. G. DEUKMEJIAN, *supra* note 173, at 7-8. Deukmejian's failure to distinguish between victims and witnesses—the latter category being broader than the former—weakens his argument. Moreover, other studies contradict the ABA study. For example, Robert Elias found that the release on bail of an assault or robbery defendant had little influence on whether victims pursued their cases in court. *See* R. ELIAS, *supra* note 54, at 106 (81% of respondents said release had no effect at all, and 18% said release had an effect; of those affected, about half said release made them fearful, and about a quarter said it made them angry). *Cf.* W. SPELMAN & D. BROWN, CALLING THE POLICE: CITIZEN REPORTING OF SERIOUS CRIME 181-82 (1981) (while delay in reporting crimes is largely attributed to inconvenience, fear of reprisal and embarrassment and culpability, authors argue that "[o]ffenders do not retaliate against victims and witnesses very often.")

175. *See* notes 112-116 *supra* and accompanying text.

176. *See* note 109 *supra*.

177. *See* note 182 *infra*.

prevent his friends or relatives from harassing the victim.

The most important indictment of the harassment rationale for preventive detention, however, is that it relies on a misapprehension of the fear reaction of victims. Even if the defendant is in jail, the victim may still not feel "safe."[175] Fear reactions to violent crime can generalize far beyond what the law can address: The fear reaction, based on existential terror of death, is very real to the victim, who is likely to be acutely sensitive to possible danger and may perceive a threat even where no threat exists. While locking up the accused may eradicate a specific fear, albeit an often rational one, it does not alleviate the larger existential fear reaction to victimization.[176] Although victim harassment cannot be ignored when it exists, it hardly serves as a justification for wholesale use of preventive detention.

The second argument offered in favor of preventive detention that uses past victims is that by permitting defendants to be released on bail, the criminal justice system leaves the victim wondering whether there is "any justice in the world."[177] "Justice" in this context presumably means that the victim should be entitled to have the accused incarcerated without any formal adjudi-

cation of guilt. Such an egocentric demand might be a normal reaction for the individual, but personal frustration with the process of condemnation and punishment does not justify punishment before guilt is established. Imposition of the criminal sanction is largely a public response to crime, rather than an exclusively private one.[178] Although proponents of pretrial incarceration do not argue that preconviction punishment is a legitimate function of the criminal law, they assert that imprisonment prior to a guilt determination is not "punishment."[179] Theoretically, this may be true, but practically there is little difference. Indeed, the distinction between preventive detention and punishment has become infinitesimal, because most existing preventive detention statutes authorize detention upon a presumption of guilt or prior determinations of guilt.[180]

2 The use of a "future victim" rationale

A final rationale in support of pretrial incarceration is that it is necessary to protect future victims. Under this "public safety" rationale,[181] past victims are relevant to demonstrate the need for

178 *See* notes 319–324 *infra*.

179 The House Report on the Comprehensive Crime Control Act of 1984 states that pretrial detention does not violate due process nor does it constitute punishment, because preventive detention "is not intended to promote the traditional aims of punishment such as retribution or deterrence." H.R. Rep. No. 1030, 98th Cong., 2d Sess., 8–9, *reprinted in* 1984 U.S. Code Cong. & Ad. News 179. Former Attorney General John Mitchell's astute support of preventive detention never discusses the precise issue of punishment and only gives passing notice to the related problem of the "presumption of innocence." Mitchell, *supra* note 166, at 1231–32. *But see* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371, 378–80, 391–96 (1970) (arguing that preventive detention is unavoidably a form of punishment because it relies on determinations of moral culpability).

180 *See, e.g.*, Pub. L. No. 98–473, tit. II, ch. I, 98 Stat. 1979–1980 (1984) (pretrial detention includes consideration of nature of offense, prior convictions, and evidence against accused); Cal. Const. art. I, § 12 (bail may be denied in felony cases where facts are evident or the presumption great and clear evidence exists that the accused is likely to cause great bodily harm to others if released); Mich. Const. art. I, § 15 (where proof is "evident," bail may be denied if a violent felony has occurred and accused has prior convictions for violent felonies, or if a particular felony, such as robbery, was committed).

181 Public safety has been the predominant predication for preventive detention statutes. The preventive detention portion of the Victim's Bill of Rights adopted by initiative in California bore the headings "Public Safety Bail." Brosnahan v. Brown, 32 Cal. 3d 236, 300 app., 651 P.2d 274, 314 app., 186 Cal. Rptr. 30, 70 app. (1982). Justice Rehnquist's opinion in Schall v. Martin, 104 S. Ct. 2403 (1984), a juvenile preventive detention case, emphasizes the legitimacy of a governmental interest in public safety as a justification for pretrial detention of juveniles.

preventive detention *only* if they were victimized by a person who had been released from custody pending trial.[182]

Preventive detention denies free will or choice and rests on a deterministic, wicked person theory of crime.[183] The accused become "criminals," and as such, they may be removed from society for society's protection. The transformation of human beings into criminals justifies incarcerating them whether or not they have formally been found guilty of an offense.[184] Moreover, if arrest is taken as sufficient evidence of guilt, the question of punishing the innocent never arises under this rationale.[185]

182 *See* Task Force, *supra* note 71, at 22–23 ("Victims of violent crime have expressed with outrage and indignation their dissatisfaction with bail laws. . . . Victims who have been robbed or raped, and the families of those murdered by persons who were released on bail while facing serious charges and possessing a prior record of violence, simply cannot understand why these persons were free to harm them."). Elias found that, although the vast majority of victims in his study were opposed to granting bail, the opposition in part was because of confusion about pretrial detention. "Many seemed to think that pretrial detention was part of the defendant's punishment for committing the crime, and that by being released, he was 'getting off' from his crime." R. Elias, *supra* note 72, at 105.

183 This characterization is Kelman's. Kelman, *supra* note 28, at 216. The President's Task Force embraces this theory. "In deciding issues of bail, the court must balance the defendant's interest in remaining free on a charge of which he is presumed innocent *with the reality that many defendants have proven, by their conviction records, that they have committed and are likely to commit crimes* while at large." Task Force, *supra* note 71, at 23 (emphasis added).

Despite the Supreme Court's recent acceptance of the notion that psychiatrists can predict future dangerousness for the purposes of imposing the death penalty, the ability of anyone to predict future dangerousness with much accuracy is questionable. *Compare* Barefoot v. Estelle, 463 U.S. 880 (1983) (psychiatric testimony that capital defendant is likely to commit future dangerous acts if not executed is admissible in penalty phase of capital trial), *with id.* at 916 (Blackmun, J., dissenting) (there is no evidence that psychiatrists can accurately assess future dangerousness, use of such expert testimony in penalty phase is unjustifiably prejudicial to defendants). *See also* Shobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 109–27 (1984) (clinical and actuarial predictions of dangerousness, while more accurate than random decisions, produce a significant number of false predictions of serious assaultive behavior); Wilson, *Dealing With the High Rate Offender*, 72 Jus. Pub. Interest 52, 61–63 (1983) (the nature of the present offense and prior record are not accurate predictors of who is a high-rate offender, factors that do identify likelihood of person being especially dangerous may lead to substantial errors when applied to a specific individual).

184 For example, the President's Task Force characterizes the eighth amendment right to bail as a mere "interest" in remaining free. Task Force, *supra* note 71, at 23. The transformation of a constitutional right into an interest may be justified because constitutional rights only attach to "us." Since the accused is seen as a "criminal" not as a human being, it is relatively easy to treat him differently. So, naive labels have long served the purpose of justifying atrocities against others. "Gook," "Nigger," and "dirty Jew," all have taken their place as labels inescapably linked to atrocity.

185 H. Packer, *supra* note 47, at 162–63.

Preventive detention does encourage efficiency and expediency in the criminal justice system, a central goal of the crime control model. In-custody defendants are pressured, directly or indirectly, to plead guilty to the crimes with which they are charged. If they are locked up in an overcrowded, vermin-infested, stuffy, dark, and dangerous jail, they may be motivated primarily by a desire for release, and will be much more amenable to a plea or a "deal."[186] Moreover, in-custody defendants frequently are at a disadvantage in developing factual defenses, and may even be subjected to theoretically impermissible, yet all too real, pressures from law enforcement officials to confess or to provide information.[187] In contrast, a defendant released on bail may not be as eager to proceed to trial or to plead guilty.

No convincing demonstration exists that preventive detention statutes will result in victims being harassed less frequently. Moreover, although proponents of these statutes invoke the symbol of the past victim in their campaigns to get the statutes enacted, the statutes do little to assist past victims in resolving the psychological crisis of victimization. Thus, the proponents of the crime control model have exploited the past victim to further their agenda.

B. *Rapid Processing*

A second major victim's rights proposal gives victims a "right" to a speedy trial by giving them a right to oppose continuances.[188] Victim's rights advocates frequently blame defense lawyers for obtaining continuances that unduly prolong the ag-

186. In 1978, Charles Silberman observed that "a jail sentence constitutes far more severe punishment than comparable time in prison" because of the terrible conditions in many local jails. C. SILBERMAN, *supra* note 20, at 351–52. In my experience as a public defender, clients often preferred "the pain" to the Santa Clara County main jail, and would plead even if it meant a prison term. Conditions at the jail were seen to be worse than conditions in the California prison system at that time. This may not hold true today as prison populations increase, and it may not be true in all jurisdictions, but the fact remains that many jails are so dreadful that defendants will be anxious to get out as quickly as possible.

187. In several cases, I had clients who were questioned by police officers while they were in custody, despite the fact that the officers knew they were represented by the Public Defender's Office. In one juvenile case, for example, I explicitly informed the investigating officer that my client did not wish to talk to him, only to find the officer attempting to interview my client in the detention facility a day or two later. In another case, an investigating officer persisted in asking an adult client about an offense, despite the fact that I had told the officer the client was represented by the Public Defender.

188. Lynn Times, *supra* note 71, at 63, 67–68, 75–76.

ony of the crime victim by rendering it impossible for victims "to put their experience behind them."[189] Proponents of the crime control model view so-called stalling tactics of defense attorneys to be an overwhelming block to both efficiency and swift and sure punishment, two hallmarks of this model.

While defense abuse of continuances occurs, the development of both the prosecution and the defense in a serious case can, and does, take time.[190] Investigation, forensic tests, interviews, and visits to crime scenes, among other things, are often time-consuming.[191] And in many cases, motions must be researched, prepared, and argued. Although many of those accused of a crime turn out to be guilty, investigation and preparation in even the most seemingly impossible cases occasionally do demonstrate that the accused is in fact innocent.[192] Moreover,

189. *Id.* at 67–68, 75–76, 99.

190. In the book *Helter Skelter*, for example, the prosecutor admits that had Charles Manson insisted on his statutory right to a speedy trial after his indictment on multiple murder charges, the prosecution would have been "in deep trouble" because it did not yet have sufficient evidence to convict Manson at trial. V. BUGLIOSI & C. GENTRY, HELTER SKELTER 279 (1975).

191. Some equal process advocates argue that Anglo-American criminal law causes artificially to guilt determinations and that an "inquisitorial" model would "cure" the problem of delay. *See, e.g.*, M. GRAHAM, TIGHTENING THE REINS OF JUSTICE IN AMERICA: A COMPARATIVE ANALYSIS OF THE CRIMINAL JURY TRIAL IN ENGLAND AND THE UNITED STATES (1983); J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977). This is an inaccurate assumption, however. Under continental systems, preparation and investigation are also subject to the constraints of time.

192. As Packer suggests, the presumption of innocence is honored more in the breach; the criminal process actually operates on an assumption of guilt. H. PACKER, *supra* note 17, at 160, 239. As a result, the rush to judgment can result in erroneous conviction and imprisonment of the innocent before an error is discovered or admitted. For example, Lemell Geter, a black engineer tried and convicted of armed robbery, was sentenced to life in prison in Texas, despite the fact that he had no record and several of his co-workers had attested to the prosecution that Geter was at work at the time of the robbery. Geter served 14 months in a Texas prison before the efforts of his supervisor, co-workers, and others induced the District Attorney to acknowledge his error, the apprehension of another suspect probably also helped to convince the prosecutor. *See* Applebome, *Building on Ignominy After Mistaken Life Sentence*, N.Y. Times, Mar. 23, 1984, at A14, col. 1.

In Seattle, a man was tried and convicted on a rape he insisted he had not committed. The man contacted a reporter for assistance in proving his innocence, and eventually, the police arrested another suspect who confessed. The reporter won a Pulitzer Prize for his investigative work; the innocent man lost his job and his reputation as a result of the conviction. *See* Curtis, *The Wrong Man*, San Francisco Chron., Jan. 23, 1983 (Sunday Punch), at 2, col. 2; *see also* Jones, *Dotlo's Lies Lead to Nightmare for 2 Innocent Black Men*, San Francisco Chron., Oct. 16, 1980, at A15, col. 1 (dotlo lied to police about having been robbed by two blacks, one of whom was then convicted of robbery; dotlo admitted lying before sentencing). Mandell, *Justice System Goes Astray, Victim Loses*

rushing to a judgment because of a presumption of guilt serves neither the victim nor society, particularly if the real culprit remains at large.[193]

Victims *are* likely to want a psychological "resolution" of the matter, but this kind of resolution does not ultimately depend on the outcome of the criminal case. It is simplistic to assert that the rituals of condemnation will erase so profound an experience for an individual. Continuances and delays may cause a victim to relive the event, but a victim is likely to relive portions of the event whether or not there is a delay.[194] Issues raised by victimization do not resolve themselves quickly. A reintegration and understanding of such questions as mortality, meaning, and responsibility take time. Therefore, delay may be of great benefit to a victim's psychological state,[195] and time is necessary to heal the psychic wounds created by victimization. Only for those victims who completely deny or repress their experience is a delay likely to be traumatizing, because in having to recover the experience,

---

Job Self Respect, San Francisco Chron., June 24, 1984, at A2, col. 1 (charges against a woman accused of embezzling $40,000 were dropped after persistent efforts by defense lawyers and reporter to point out numerous defects in investigation leading to the charges).

193. In one well-publicized case involving numerous rapes of women in their homes in Columbus, Ohio, an innocent man was convicted for two rapes and served five years in prison, while the real culprit remained at large and continued to attack women until police noted the similarities in the incidents and apprehended the guilty person. *See Doctor Guilty in Rapes of 21 Ohio Women*, San Francisco Chron., Sept. 23, 1989, at 25, col. 1.

194. The President's Task Force asserts that "[v]ictims . . . are burdened by uncertainty and the realization that they will be called upon to relive [the] victimization when the case is finally tried. The healing process cannot truly begin until the case can be put behind them." Task Force, *supra* note 71, at 75. This assertion simply is not supported by existing psychological evidence. The healing process begins immediately after a traumatic experience, although it may easily be interfered with if the victim receives improper signals from others. *See* notes 144–220 *supra* and accompanying text. Moreover, re-experiencing the event is itself part of the healing process. In re-experiencing the event, the victim can gain perspective and control over the experience.

195. It is, of course, not beneficial for victims to arrive at the courthouse only to learn that their cases have been continued to a later time. This problem, however, exists more because of miscalculations, problems of coordination, and poor communication than because of fundamental defects in the process. It can be controlled by allowing the victim some say to be "on call," *see e.g.*, Task Force, *supra* note 71, at 68, or by an effort on the part of prosecutors to make sure that the victim witness is aware of possible delays. An explanation of structural problems such as the availability of courtrooms, the need for preparation, and the nature of the procedural steps that need to be taken is more likely to be of benefit to victims than is rushing the case through the system without regard for preparation by either side or for the victim's psychological state.

they will be without defenses or understanding.[196]

Sometimes a delay enables victims to be better prepared for the evidence that will be introduced at trial. In one case, for example, a prominent athlete was savagely murdered and dumped in an abandoned house. The police found drugs and evidence of a sexual assault at the scene. Many people, including the victim's father, were unaware that the victim had used drugs, had been bisexual, and had frequented very rough homosexual bars. The horror of learning of his son's hidden life, which police believe had a role in the son's gruesome end, was as hard a blow to the father as was the loss of his only son. Many of the victim's friends were also shocked by the information. The police arrested two suspects, but a writ filed by their attorneys caused a substantial delay in the case. Nevertheless, the delay helped the victim's father and friends recover from their shock. During the delay, they had accepted the reality of the victim's flaws as well as his truly great characteristics. If the defense were to pursue "drug-crazed homosexual panic" as the reason for the homicide, the prosecution and its witnesses would be able to withstand the accusations against the victim, and indeed, anticipate and disarm the potentially prejudicial effect of this information on the jury. It would not be easy for any of the witnesses or for the victim's father, but it would certainly be better for them than if the trial had proceeded rapidly.

Endless delays and confusion can harm victims, but rushing towards a conclusion can be equally harmful. Temporal distance from the event is important to healing, and treating the victim with respect may ultimately benefit the victim more than rapid process.

C. *Restrictions on Plea Bargaining*

Plea bargaining serves a number of pragmatic and instrumental purposes.[197] In fact, guilty pleas constitute the major propor-

---

196. *Cf.* Sales, Baum & Shuman, *supra* note 98, at 130 (study found rapid return to normal behavior followed by increase in symptoms; further research necessary to clarify significance); Burgess & Holstrom, *supra* note 89, at 985 (victims who had not reported previous molestation or assault and who were subsequently raped had not processed earlier trauma).

197. There are three general types of plea bargains: a plea to some charges in return for the dismissal of others; a plea to a lesser included offense in exchange for dismissal of more serious charges with a corresponding reduction in penalty; or a plea to charges with some sentencing considerations.

tion of convictions in the United States.[198] Plea bargaining can have a "salutory" effect for the prosecution in some instances, as when a minor participant in a crime pleads to lesser charges and testifies against his coparticipants, or has the charges dismissed in exchange for truthful testimony against more culpable defendants.[199] It also permits a degree of flexibility in cases where the application of a rule would produce an unduly harsh result.[200]

Many crime control advocates and others view plea bargaining in its current form as a nefarious practice that routinely places muggers and rapists back on the streets to terrorize society.[201] This view of plea bargaining produced a provision in the

198. As high as 90% of the convictions in the United States may be the result of guilty pleas, a great number of which are undoubtedly the result of plea bargaining. See S. Kadish, S. Schulhofer & M. Paulsen, supra note 141, at 151-55 (1983) (empirical studies show a wide range of guilty plea rates: in one study, New York had a 92.7% rate, while Pennsylvania only had a 65.5% rate); Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 1222 (5th ed. 1980) (quoting Chief Justice Burger's estimate that approximately 90% of defendants plead guilty); Judicial Council of California, 1983 Annual Report 120-21 (1983) (in 1981-1982, 78% of the felony cases filed in California superior courts, other than in Los Angeles County, were disposed of by guilty plea; Los Angeles had a rate of 82%); see also H. Zeisel, The Limits of Law Enforcement 34 (1982). But see Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037 (1984) (arguing that Philadelphia courts have largely and successfully abolished plea bargaining as chief method of disposition of cases).

199. For example, the prosecution offered immunity from prosecution to Linda Kasabian, an accomplice in the murders of seven people, if she agreed to testify truthfully against Charles Manson at trial. See V. Bugliosi & C. Gentry, supra note 190, at 112.

200. A prosecutor in Santa Clara County related the following case that he had been assigned for trial. A mentally ill, but not legally insane, man who lived in his car apparently was hungry and decided to steal some food to eat. His solution was to enter a house at night and "walk past the stereo, the television, and the cameras" to the kitchen. He opened the refrigerator and took "a jar of Skippy peanut butter and a loaf of Buttertop bread" and left. The police found him not long afterwards in his car; during the search they found a jar of crunchy Skippy peanut butter and a partial loaf of Buttertop bread. The defendant admitted that he had taken them. Although the deputy district attorney assigned to try the case felt that he would have problems proving exactly whose peanut butter and bread the defendant had, he was more troubled by the fact that a strict interpretation of case law and the California Penal Code made this offense a first degree burglary, with a mandatory state prison term. The plea bargaining policies of the office were very strict; the defendant's choice of private refrigerator instead of a grocery store made him technically guilty of a felony carrying a mandatory prison term, rather than a misdemeanor petty theft, and the deputy district attorney felt such a result was unjust. Moreover, court time would be taken up in a jury trial, and apparently the victim wasn't too upset about the loss of the food. The deputy finally persuaded his supervisor to allow him to reduce the charge to misdemeanor burglary, to which the defendant pled guilty. (Confidential communication.)

201. See Brosnahan v. Brown, 32 Cal. 3d 236, 305 app., 651 P.2d 274, 319 app., 186 Cal. Rptr. 30, 75 app. (1982) (reprinting Proposition 8 ballot statements); Y.

California Victim's Bill of Rights which seeks to abolish plea bargaining in cases charging enumerated "serious felonies" and in felony driving-under-the-influence cases.[202] California law now prohibits plea bargaining in cases that charge these crimes unless the prosecution has "insufficient evidence," the testimony of a "material witness cannot be obtained," or "a reduction or dismissal would not result in a substantial change in sentence."[203] The California law forecloses any consideration of a victim's willingness or ability to testify at trial as a justification for plea bargaining, unless the language about "obtaining testimony" is read more broadly than are California's evidentiary provisions regarding unavailability of witnesses.[204]

One commentator supports laws like California's, asserting that because of plea bargaining, "victims may be deprived of their opportunity to have the cathartic experience of testifying against the defendant."[205] But is testifying against a defendant really "cathartic"? If the term is used loosely to mean the release of tension, testifying can be viewed as "cathartic."[206] In strict psychoanalytic terms, however, catharsis involves the retrieval of threatening or painful early life experiences and the process of bringing those emotions into consciousness to be expressed.[207]

Kamisar, W. LaFave & J. Israel, supra note 198, at 1224 n.a (quoting statement of New York Police Commissioner Patrick Murphy attacking plea bargaining and the court system and implying that plea bargaining as to felony gun possession leads to many murders); E. Van den Haag, supra note 54, at 157-63, 171-73 (attacking courts and liberals for making plea bargaining a tool for allowing even serious offenders to go unpunished, thereby raising the crime rate).

202. Cal. Penal Code § 1192.7 (West 1982).

203. Id.

204. For narrow interpretations of California's provisions regarding witness availability, see People v. Enriquez, 19 Cal. 3d 221, 233-37, 561 P.2d 261, 269-71, 137 Cal. Rptr. 171, 178-81 (1977); People v. Williams, 93 Cal. App. 3d 40, 51-55, 155 Cal. Rptr. 414, 419-22 (Cal. Ct. App. 1979); People v. Gomez, 26 Cal. App. 3d 225, 230, 103 Cal. Rptr. 80, 83-84 (Cal. Ct. App. 1972).

205. Gifford, supra note 158, at 74. Needless to say, considerable controversy exists in the psychotherapeutic community as to whether catharsis is helpful or necessary to recovery from trauma. See, e.g., A. Beck, Cognitive Therapy and Emotional Disorders (1979) (cognitive approach to helping relieve emotional distress); F. Fromm-Reichmann, Principles of Intensive Psychotherapy (1960) ("catharsis" and insight overrated as therapeutic devices; process and relationship more likely to relieve emotional distress).

206. The lay witnesses and victims I have talked with certainly were relieved after they testified. Their relief was less related to the tension created by having to think about the crime than to the tension produced by the mere prospect of testifying, however.

207. As Yalom points out, Freud saw catharsis as the release of repressed affect

they prepare their victim-witnesses.[215] Such common sense lawyering does not require fundamental changes in the criminal law or process. It simply requires an awareness on the part of prosecuting attorneys that although they and their law enforcement witnesses understand the law, the courtroom procedure, and the mechanics of testifying, lay witnesses frequently are not familiar with the process.

Accordingly, an absolute restriction on the use of plea bargains eliminates consideration of the emotional needs of the individual victim altogether, and to restrict plea bargains because some victims are dissatisfied with the results seems ill-advised.

D. *Abolition of the Exclusionary Rule*

Perhaps the most cynical manipulation of victim's rights is the invocation of these "rights" by crime control advocates as a justification for abolition of the fourth amendment's exclusionary rule.[216] The California "Victim's Bill of Rights" attempted to circumvent the exclusionary rule in a section titled "Truth in Evidence,"[217] and the President's Task Force recommended abolishing the fourth amendment exclusionary rule altogether.[218]

The exclusionary rule as a mechanism for enforcing the fourth amendment's prohibition on unreasonable searches and seizures has been the subject of endless debate.[219] Liberals see the exclusionary rule as a sometimes troubling, but necessary, means of preventing Gestapo-like police tactics.[220] Conservatives see it as a counterintuitive, counterproductive rule that allows "criminals" to go unpunished.[221] Liberals may overstate the case when they argue that the exclusionary rule is the only thing that stands between the populace and a police state and that any diminution of the rule is a step towards fascism. But the knock on the door at night is just as threatening to existence as the nighttime burglar.

Whether or not the exclusionary rule is the appropriate solution to the problem of individual security against the state, it has had a salutary effect on police practices and has promoted efficiency in investigations.[222] Nevertheless, the present Supreme Court has steadily moved toward abolishing the rule. Doctrinally, the Court has narrowed the rule from a general protection against governmental intrusions to a tool for specific deterrence of particular police misconduct.[223]

---

215 Preparation of lay witnesses through a mock direct and cross examination can help them understand the process. To the extent that we understand something, we are less likely to fear it and less likely to feel helpless about the outcome. When information about something can be obtained, anxiety will likely be reduced even if the experience itself cannot be fully grasped ahead of time. M. SELIGMAN, HELPLESSNESS 107-33 (1975). Explaining how the preliminary hearing, grand jury, or trial is conducted can give victims a better feeling of mastery and control. I have suggested to several rape victims that they watch part of another trial, civil or criminal, before they themselves testify in order to get a picture of what a courtroom proceeding is like. With this experience behind them, the prospect of testifying is not so intimidating. Those who have tried this have found it helpful. I have also advised victims to obtain a copy of the transcript of their testimony at any preliminary hearings to review before the trial, especially if there has been a long delay between the preliminary hearing and the trial. No reason exists for prosecutors not to do their best to prepare witnesses in a like manner. Although many deputy district attorneys have heavy caseloads, they should be able to take the time to acquaint their lay witnesses with the basics of the process.

214 *See* note 80 *supra*.

215 CAL. CONST. art. I, § 28(d) (West 1983).

216 TASK FORCE, *supra* note 71, at 21-28.

217 Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (containing major arguments for and against the exclusionary rule and an analysis of the historical reasons for the fourth amendment).

218 *Id.* at 100. The German experience, as well as the more recent examples of Chile, *see, e.g.*, Chavez, *Church Says Civil Rights in Chile Are Eroding*, N.Y. Times, Nov. 1, 1981, at 13, col. 1, and Argentina, *see, e.g.*, J. TIMMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (1981), should serve as a warning against giving authorities too much power as a result of fear or economic instability.

The tendency to consider a criminal as an "other" or "it" rather than as a human being, leads many conservatives to overlook the potential for tyranny. Denying the humanity of offenders is the easiest way to dismiss the problem of human actions that are evil, and it permits us to use the paradigm to dominate thought and action in response to crime. Accordingly, the right to freedom from unreasonable searches and seizures does not attach to offenders. Offenders are simply not included in "the people."

219 Task Force, *supra* note 71, at 27-28. Chief Justice Burger has long opposed the exclusionary rule. *See* Bivens v. Six Unknown Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) ("Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it exacts from society—the release of countless guilty criminals."). J. PACKER, *supra* note 32, at 56-58.

220 For a discussion of immediate reactions to the exclusionary rule, see Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L. & CRIMINOLOGY 171 (1962). After the Oklahoma Supreme Court adopted an exclusionary remedy, then Attorney General Edmund G. Brown stated that the police had done better investigatory work and that investigations "are more thorough and within American constitutional concepts. . . . I believe the overall effects of the decision have been excellent." *Id.* at 179. The U.S. Attorney for the District of Columbia also opined that the exclusionary rule improved police preparation of cases. *Id.*

221 *See* Allen, *supra* note 32, at 535-37; Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1, 32-42 (1982); Meserve & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Doubling the Law*, 70 GEO. L.J. 305, 323 (1981).

In United States v. Leon, 104 S. Ct. 3405, 3421-24 (1984), the majority opinion emphasized the question of specific deterrence of particular police officers who obtained

The exclusionary rule has a minimal effect in the vast majority of cases. The rule affects only a very small percentage of prosecutions.[222] But opponents of the rule perceive it as interfering with effective and efficient law enforcement. They have never abandoned their efforts to abolish it and now have recharacterized their opposition to the rule as an issue of "victim's rights." Their assertion that "victim's rights" compel the abolition of state and federal exclusionary rules seems post hoc, and the efforts to define a victim's "right" that outweighs the constitutional right to be protected from unreasonable searches and seizures are strained. For example, the President's Task Force asserts:

> It must be remembered that the exclusionary rule is a remedy only, and not a very good one. It thus rewards the criminal and punishes, not the police, but the innocent victim of the crime and society at large for conduct they may not condone and over which they have little or no control.[223]

a search warrant from a superior court judge in concluding that the officers had relied on the warrant in good faith and that the evidence obtained should not have been suppressed, despite the fact that the affidavit submitted in support of the warrant failed to provide enough information to establish probable cause. *See also* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982) (arguing that the good faith exception will encourage police to engage in conduct otherwise impermissible under the fourth amendment).

222. The empirical studies available contradict the prevailing wisdom that countless guilty people go free as a result of the suppression of evidence. *See, e.g.*, Davies, *How Much Do We Know and Still Need to Learn About the Costs of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RESEARCH J. 611 (criticizing a National Institute of Justice study for concluding that the exclusionary rule had a major impact on criminal prosecutions in California on the basis of data that indicates the opposite conclusion; only 2.4% of felony arrests in California are not prosecuted by the prosecution as a result of unlawful searches and seizures); U.S. COMPTROLLER GENERAL, REPORT ON IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979) (only 1.3% of all cases studied had evidence suppressed as a result of a successful suppression motion); Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RESEARCH J. 585 (motions to suppress evidence were filed in less than 5% of all cases, of those motions filed to suppress physical evidence, only 17% were granted; this only 0.7% of all cases included a successful motion to suppress physical evidence obtained through an illegal search or seizure; only 0.4% of all cases were "lost" because of a motion to suppress physical evidence); *see also* Carlson, *California's Appeal Court Reversal Rate*, San Francisco Chron., Aug. 25, 1983, at 12, col. 1 (detailing study by California Judicial Council finding that only 7% of 601 criminal appeals in California resulted in reversal and that over one fourth of these were the result of sentencing errors). *But see* NATIONAL INST. OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982) (concluding that 5% of all felony cases in California were rejected by prosecutors because of search and seizure problems and that from 1976 to 1979, 30% of all felony drug cases were rejected because of the exclusionary rule).

223. Task Force, *supra* note 71, at 25.

After enumerating all the perceived "costs" to the criminal process—"handcuffing police," suppression of "perfectly good" evidence, court delays, and the lack of any danger to the rights of "law abiding" citizens, the Task Force goes on to state:

> Victims are adversely affected by the rule's operation at every turn. When the police fail to solve the crime because of inaction, the victim suffers. When cases are not charged or are dismissed and the "criminal goes free because the constable blundered," *the victim is denied justice*. When the case is continued interminably or must be retried, the victim is hurt time and time again.[224]

The Task Force uses the symbols of both past and future victims as embodied by society's interest in crime prevention to justify abolition of the exclusionary rule in a confusing way; the Task Force decries the costs to society of allowing the guilty to go unpunished and emphasizes the rule's interference with efficiency in the process. Even the Task Force's claims that are more applicable to past victims are grossly exaggerated, reflecting a hostility to the rule itself, rather than any particular solicitude for past victims. For example, the statement that the exclusionary rule causes police inaction simply does not make sense.[225] The suggestion that the exclusionary rule is the major source of continuances, delays, and retrials is not supported by available statistical evidence.[226] In the vast majority of cases involving core crime, the exclusionary rule makes no difference to the result. Indeed, it has become almost a truism in defense circles that, while courts may grant suppression motions in drug cases, they invariably deny them in murder cases.[227] The strongest refutation of the Task Force position, however, is that reversals of convictions on fourth amendment grounds appear to constitute only

224. *Id.* at 28 (emphasis added).

225. Because so few cases are "lost" because of the exclusionary rule, *see* note 222 *supra*, it is very unlikely that police will be discouraged to the point of inaction. While I am aware of instances where the police have not asked the district attorney to issue a complaint because they are aware that the evidence seized during a search would probably be suppressed, those instances did not involve violent crimes, and they certainly did not involve "inaction."

226. *See* note 222 *supra*.

227. *See* Nardulli *supra* note 222, at 592 & table 13 (of the cases that were "lost" because of suppression of physical evidence, less than 20% were "serious," involving unarmed robbery, arson, and burglary); Davies, *supra* note 222, at 647 ("while there are not truly comprehensive statistics on the number of arrests rejected or dismissed because of illegal searches, all the pieces of data we do have show the general effect of the rule to be quite low, and the effect in rounding arrests and violent crime arrests to be quite low.").

a tiny fraction of all reversals of criminal convictions by appellate courts."[228]

Undeniably, retrials of serious cases necessitated by an appellate court reversal may be difficult for past victims. But it seems unlikely that the degree of difficulty is necessarily related to the *reason* for the reversal and retrial, or that having to testify again because of a reversal resulting from fifth or sixth amendment violations or instructional errors is less "traumatic." The attitudes of the police or prosecutor towards the grounds for the reversal might, however, exacerbate the situation if the prosecutor emphasizes to the victim the "needlessness" of having to retry the case, or conveys the appellate court's solicitude towards the guilty "criminal."

A second argument offered by the Task Force in opposition to the exclusionary rule is that it denies the victim justice. This argument appears to assume that a victim has a right to a conviction of the accused or, perhaps, a right to revenge.[229] But the history of the criminal process does not support a finding of such a right.[230] Whether victims have a right to a conviction should be examined in terms of whether they have a cognizable interest in participating in the sentencing of offenders and whether they have a "right" to recovery from the wrongdoer, the subjects of the next section.

V. Victim Participation in Sentencing

Ironically, the most politically visible activity in the victim's rights movement focuses on the end, rather than on the beginning, of the criminal process. Advocate groups such as MADD attend the sentencings of defendants;[231] formalized victim participation at sentencing frequently appears in victim's rights pro-

228. Of 75 criminal writs and appeals decided by the California courts of appeal in both published and unpublished opinions between January 1, 1981 and February 28, 1983, only 12.1% resulted in a reversal. Of the reversals, only nine cases, or 5.12% of the total appeals, involved errors in motions to suppress evidence, and a few of those were reversed for improper *suppression* of evidence, one of the nine cases involved a *Miranda* issue. Judicial Council of California, 1983 Annual Report 7-8 (1983); *see also* Carlson, *supra* note 222.

229. *See* notes 262-374 *infra* and accompanying text.

230. *See* notes 14-23 *supra* and accompanying text.

231. *See* Buss & Needham, *Making Sure Drunk Drivers Pay*, San Jose Mercury News, Dec. 18, 1983, at 1A, col. 1 (reporting the effect of MADD monitoring on sentencing judges in Santa Clara County, California); *cf.* Magagnini, *Drunk Case Judges Mad at Monitors*, San Francisco Chron., May 16, 1983, at 1, col. 2 (San Francisco County judges found MADD monitoring inappropriate; MADD advocate quoted as saying, "There are judges ... who failed to get re-elected because MADD is all over their tails.")

posals;[232] and many states have recently adopted provisions allowing victims to participate in sentencing proceedings.[233] Leaving aside the question of restitution for the moment, the following discussion evaluates the desirability of such participation in terms of the justifications for imposing the criminal sanction and in terms of whether or not the justifications promote the interests of the victim.

A. *The Relevance of Victim Participation to the Justifications for the Criminal Sanction*

The classic justifications for the criminal sanction are deterrence, incapacitation, rehabilitation, and retribution. At different times, different justifications are in ascendancy, but one single justification never entirely determines the imposition of the criminal sanction. Since each justification is analytically different, however, this part discusses each justification separately to determine whether each supports victim participation in sentencing.

1. *Deterrence*

The essentially utilitarian foundation of deterrence theory is the premise that punishment has the socially useful function of preventing crime.[234] Deterrence theory has two components: general deterrence, where the punishment meted out for a criminal act discourages others from engaging in the specific wrong-

232. *See e.g.*, Task Force, *supra* note 71, at 74-78.

233. *See* Ariz. Rev. Stat. Ann. § 13-702(I) (1983); Cal. Penal Code § 1191.1 (West Supp. 1985); Conn. Gen. Stat. Ann. § 54-91a (West Supp. 1984); Del. Stat. § 9211(3) (Supp. 1984); Md. Rev. Stat. Ann. art. 27-A, § 12(f) (Supp. 1984); Mass. Ann. Laws ch. 258B, § 3(d), ch. 279, § 4B (Michie/Law Co-op. 1985); N.H. Rev. Stat. Ann. § 651:4-a (Supp. 1983); R.I. Gen. Laws § 12-28-4 (Supp. 1984); Utah Code Ann. § 10-35-200 (Supp. 1984); W. Va. Code § 61-11A-2 (1984).

234. Cesare Beccaria repeatedly emphasized deterrence as the justification for punishment of offenders in *An Essay on Crimes and Punishments*, published in 1819: the purpose was social betterment. "The degree of the punishment, and the consequences of a crime, ought to be so contrived as to have the greatest possible effect on others, with the least possible pain to the delinquent." C. Beccaria, An Essay on Crimes and Punishments 7-8 (1819 & photo. reprint 1953) (emphasis deleted). Jeremy Bentham is probably the most well known spokesman for the utilitarian theory that punishment is an evil in and of itself and only is justifiable if it serves the greater social good of preventing some greater evil: "[Bentham, An Introduction to the Principles of Morals and Legislation (1876), *reprinted in* S. Kadish & S. Schulhofer & M. Paulsen, *supra* note 60, at 189. *See generally* H. Packer, *supra* note 17, at 39-45 (summary and critique).

doing,[235] and specific deterrence, where punishment of the individual wrongdoer dissuades him from engaging in further wrongdoing. General deterrence seeks to educate others; specific deterrence seeks to educate the individual offender.

General deterrence requires that the penalties for crimes be sufficiently severe—and certain—to prevent people from committing those crimes; it assumes that a rational person will "trade off" the benefits of engaging in criminal conduct for the benefits of escaping punishment.[236] But despite increased penalties for crime, the rising crime rates of the past few decades seem to contradict the assumption that general deterrence is effective.[237] Indeed, complete general deterrence appears to be an unmanageable ideal, and the theory has fallen out of popular favor as a justification for the criminal sanction.[238] Nonetheless, the educational function of the criminal sanction remains a consideration, if only *sub silentio*, in criminal sentencing literature and in practice.[239] For general deterrence purposes, the participation of the individual victim seems to be of negligible value in determining sentences because this theory concentrates on the moral beliefs and behaviors of the community. It holds that the imposition of the criminal sanction deters crime, regardless of who the victim is. The locus of general deterrence is public and

235 H. PACKER, *supra* note 17, at 39; J. VAN DEN HAAG, *supra* note 59, at 181–83.

236 Kelman characterizes this premise as a "variety of economic theories that correspond in the philosophical literature to arguments justifying punishment as necessary to deter crime" and notes that "[p]hilosophically, the central method of the economic view of crime has focused less on optimal criminality than on the observation that we can reduce crime by upping its price." Kelman, *supra* note 28, at 214, 216.

237 The rise in crime, including violent crime, might have been attributable more to an increase in the population of people at a crime prone age than to anything else, but fear has caused a shift in thinking from deterrence to incapacitation and retribution. *See e.g.* *In Defense of Fear*, 1980 Jan. 21, 1983, at 28, 28–29 (discussing the influence of rising rate of violent crime on reemergence of capital punishment). Cutler, *supra* note 29, at 32–33 (failure of deterrence has caused a shift in focus from deterrence theory to incapacitation theory).

238 This is true despite efforts of conservative criminologists to demonstrate that the threat of increased incarceration can affect the behavior of marginal individuals. *See* note 235 *supra*; Cutler, *supra* note 29, at 32.

239 As Packer notes, "the symbolic richness of the criminal process is a powerful deterrent" that serves to reinforce societal values. H. PACKER, *supra* note 17, at 44. The stigmatization of guilt and social condemnation still exerts a powerful force on behavior. Consider, for example, the transformation in social attitudes about driving under the influence currently being undertaken by the media, MADD, and insurance companies. At one point, driving under the influence was not a crime taken seriously, and a conviction carried little stigma.

nonindividualized; victim participation is not necessary to educate the community.

Specific deterrence is aimed at preventing the individual offender from engaging in future criminal activity.[240] Achieving specific deterrence does not require victim participation at sentencing, rather it requires a calculation of the appropriate level of punishment to teach the offender to abstain from wrongdoing in the future.[241]

2 *Incapacitation*

Proponents of the incapacitation approach believe that the best way to prevent a particular offender from committing future crimes is to remove him from society.[242] This belief is based on predictions or assumptions of future dangerousness or propensity to commit crimes that are not necessarily related to the actual crime for which the offender is sentenced.[243] In fact, the relationship between the actual offense and future dangerousness may be attenuated at best.[244] Although the *manner* in which the offender committed the crime might intuitively seem relevant to a determination of dangerousness, it may be of limited usefulness.[245] The factors examined in determining whether to incapacitate an offender are related to the characteristics of the

240 *See id.* at 39, 45–48.

241 *Id.* at 45. The common wisdom is that by putting an offender in jail or prison, we demonstrate to him that his behavior will not be tolerated. He should consequently learn not to repeat that behavior. Recidivism rates would seem to deny the efficacy of special deterrence, however, *id.* at 46, but as Packer notes, "we are certainly not in a position now to say that the concept has no utility." *Id.* at 47. Special deterrence or "immobilization," may be very effective on some individuals, or on some types of crime, and its efficacy may depend in part on the level of brutality of the prison experience. *Id.*

242 *Id.* at 48. Incapacitation is enjoying renewed popularity. *See* note 237 *supra*; *see also* Wilson, *supra* note 183, at 52, 61 (believe incapacitation is the "most rational way to use the incapacitative powers of our prisons.")

243 *See* Wilson *supra* note 183, at 61–62. *But see* Cohen, *Selective Incapacitation: An Assessment*, 1981 U. Ill. L. Rev. 253, 281 & n. 67 (data in a Washington, D.C., study indicated that 15.3% of auto thefts were committed by specialists, 19.8% of burglaries, and 28% of robberies).

244 *Cf.* Shinagan, *supra* note 183, at 119–24 (1981) (comparing usefulness of clinical assessments to predict future dangerousness that rely on nature of present offense and psychological variables with usefulness of predictions based on demographic variables that have been statistically demonstrated to correlate with violent behavior).

245 *See id.* at 119–23, 153–54 ("The fact that a homicide is committed in a particularly vile manner does not necessarily mean that its perpetrator is more likely to commit a second violent act than a more fastidious murderer.")

offender, rather than to those of the victim.[246]

3. *Rehabilitation*

The rehabilitative goal of the criminal sanction has not received widespread support. But unless we are to incapacitate all offenders for all time, rehabilitation cannot be dismissed entirely because of our longstanding interest in reforming offenders in order to prevent them from committing future crimes. Rehabilitation, like incapacitation, is "offender-oriented," rather than "offense-oriented." It concentrates on the offender, his nature, and what is needed to correct his undesirable behavior.[247] To the extent that the offender's past behavior offers a clue about what rehabilitative steps are necessary, the nature of the crime committed may be relevant to a sentencing decision. Yet unless the victim knows the offender, it is unlikely that he or she can supply the sentencer with helpful information about the crime or the offender that is not already available from other sources.

In a few instances, rehabilitation-oriented sentences may seem to depend upon, or benefit from, victim cooperation. For example, the successful rehabilitation of perpetrators of domestic violence or child abuse appears to necessitate therapeutic intervention that requires both victim and offender participation.[248] This is quite different, however, from giving the victim a role in determining *what* sentence to impose. Instead, it gives the victim a role in *implementing* the sentence.

4. *Retribution*

One meaning of retribution is associated with a theory of moral blameworthiness that justifies punishment. Although what constitutes appropriate punishment is both morally and culturally determined,[249] the guiding notion is that defendants must pay a "debt" to society to make amends for their wrongs.[250] The other, perhaps more automatic meaning of retribution is simply that of revenge: Society has a right to retaliate against those who have hurt it or failed to follow its rules.

The moral blameworthiness, or "moral retributionist," view subdivides further into two general components: One view, associated with Kant, is that crime merits punishment simply because it is wrong;[251] the other view, identified by Herbert Morris, holds "that society's members implicitly agree to an allocation of benefits and burdens,"[252] and "punishment serves the purpose of restoring the equilibrium of benefits and burdens"[253] upset by the wrongdoer. Both of these approaches embody a proportionality principle—a correspondence between the wickedness of the act and the suffering to be inflicted upon the actor. The arguments for this side of the retributionist thesis gain strength by using an "innocent" victim to illustrate graphically the offender's blameworthiness. But importing the victim into the blameworthiness calculus logically requires courts to call into question the victim's relative blameworthiness—to measure the offender's actual

246 Wilson, *supra* note 183, at 62–63, 65 (predictive factors for high rate offenders include, among other things, a poor criminal record, a history of drug or alcohol abuse, and a documented inability to secure a job).

247 As Packer observes, however, "we do not know how to rehabilitate offenders, at least within the limit of the resources that are now or might reasonably be expected to be devoted to the task." H. Packer, *supra* note 17, at 55. In a general sense, this is true, although knowledge about the relationship of substance abuse and criminal activity, for example, does provide some direction for "rehabilitative" efforts.

248 If an agency or organization is willing to work with a child abuser, it may be preferable to maintain the family unit and have all family members participate in therapy if they are willing, rather than to send the offender to jail. Parents United, for example, has been successful in counseling sexually abused children and the abusing parents.

249 *See* Cohen, *Moral Aspects of the Criminal Law*, 49 Yale L.J. 987, 990–91 (1940). H.L.A. Hart argues, for example, that

> a person may be punished if, and only if, he has voluntarily done something morally wrong. . . . his punishment must in some way match, or be the equivalent of, the wickedness of his offence, and . . . the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good.

H.L.A. Hart, Punishment and Responsibility 231 (1982). Normative words and phrases haunt this formulation. What relevance exist for determining "wickedness" or "moral evil voluntarily done"? A moral code in one culture may be vastly different from that in another. Similarly, the "wickedness" of a given act may be greater in one society than in another. Lloyd Weinreb has found the concepts of "desert" and "moral responsibility" to have normative components, he is, however, unable to find other concepts to replace them. *See* Weinreb, *The Complete Idea of Justice*, 54 U. Colo. L. Rev. 579 (1984).

250 Punishment of those who deserve it is, under classic retribution theory, self-justifying. *See e.g.*, H.L.A. Hart, *supra* note 249, at 231 ("suffering for moral evil voluntarily done, is itself just or morally good"). But the infliction of pain is not something that we can universally agree is "good," so we seek other justifications as well. Some have argued that punishment for wickedness is a means to "atone" for the wicked deed. *See, e.g.*, H. Packer, *supra* note 17, at 38. Others see the punishment as a "payment" of a "debt." *See e.g.*, H. Morris, On Guilt and Innocence 34–36 (1976).

251 *See* I. Kant, The Metaphysical Elements of Justice 99, 102 (J. Ladd trans. 1965), *quoted in* S. Kadish, S. Schulhofer & M. Paulsen, *supra* note 60, at 187–88.

252 Morris, *Persons and Punishment*, in Punishment 75 (J. Feinberg & H. Gross eds. 1976).

253 *Id.*

moral culpability requires examining whether the victim "deserved" what he got and whether "[t]he harm the criminal does to society by taking the law into his own hands could be insignificant in comparison to the benefaction . . . that would otherwise be left undone."[254] Although the substantive criminal law does occasionally shift blame to the victim, as illustrated by the justification of self-defense, it does so only in a very narrow sense.[255] Considering the victim's blameworthiness at sentencing, rather than at adjudication, may act to distort the substantive law governing the initial determination of guilt.

A related question is whether "victim precipitation" should be taken into account at sentencing. "Victim precipitation" refers to victim conduct that induces or provokes another to commit a crime and is a broader concept than that of victim culpability.[256] One commentator has argued that certain types of victim precipitation *should* be considered at the sentencing stage because they "make the crime more understandable and in many instances lessen the [offender's] moral culpability."[257] While this may follow logically from an attempt to calculate the extent of someone's moral blameworthiness, it does result in a difficult inquiry as to "relative badness."

A determination of "relative badness" at the sentencing phase closely resembles the concept of contributory or comparative negligence. These concepts may already explicitly or implicitly influence sentencing determinations,[258] but *formal* recognition of the victim's presence can produce unpredictable results. In a recent case, the defendant, convicted of driving under the influence and of manslaughter, received a minimal sentence for killing two drunken pedestrians, despite the arguments by the next of kin at sentencing for a harsh penalty. The sentencing judge observed that the pedestrians were "more to blame" than the driver for their deaths.[259] Presumably, some explicit standards for measuring victim blameworthiness or victim precipitation could be devised to guide sentencing judges, but adopting such standards is ill-advised. No self-evident source for the development of these standards exists. An inquiry into comparative blameworthiness could increase the appearance of capriciousness in the criminal process. Such an inquiry could create a normative nightmare for both victims and society, because it necessarily would consider how the victims should have acted. The prototypical example of this problem is the crime of rape, where both law and society have traditionally "judged" the victim on the basis of who she was, where she was, how she was dressed, and whether or not she resisted.[260] Finally, despite its fall from grace,

---

254 Commentary, *Constitutional Law: The Death Penalty—A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification*, 33 OKLA. L. REV. 567, 581 (1981). Criminal actions may be a self-help device to improve social control. *See* Black, *Crime as Social Control*, 48 AM. SOC. REV. 34, 36 (1983) ("Like the killings in traditional societies described by anthropologists . . . most intentional homicide in modern society may be classified as social control specifically as self-help, even if it is handled by legal officials as crime.") And there may be a tendency by legal officials to respond less harshly in the self-help situation where the victim arguably "deserved" his or her victimization. *Id.* at 40, 42. One recent, and extreme, example of this form of social control/self-help involved the fatal shunning of a man who had bullied residents of a small town in Missouri. Investigation of the homicide was stymied by the refusal of any of the town's citizens to identify the killer or to admit that they had seen anybody fire at the victim. The case received a great deal of media attention and dramatically illustrates the use of self-help by a community that believed its existence to be threatened. While it may very well be that the person or persons who shot the victim would legally be guilty of murder, the behavior of the victim—carrying a gun and terrorizing the community—seems to be equally "blameworthy." *See Widow of Slain "Town Bully" Seeks $11 Million for Death*, San Jose Mercury News, July 11, 1981, at 9A, col. 1.

255 *See* G. FLETCHER, RETHINKING CRIMINAL LAW 855–75 (1978) (discussing tensions in the law of self-defense created by theoretical and pragmatic concerns with choice, culpability, and rights).

256 Gobert, *Victim Precipitation*, 77 CRIMES L. REV. 511, 511 (1977).

257 *Id.* at 535.

258 *Id.* at 539-40. A 19-year-old man, who shot and killed his father, was found guilty of voluntary manslaughter following a court trial in California. Apparently the victim had been known to beat his wife and sexually abused his daughters, the motive the victim was shot. In beat his wife and threatened to kill his 19-year-old son. In sentencing the defendant to five years' probation, the judge commented that the victim was "the scum of the earth" and "a man the planet Earth can relate without quite much." *Father Killer Sentenced to 5 Years' Probation*, San Francisco Chron., Feb. 25, 1984, at 5, col. 4. *Judge Seeks Sentencing Ideas*, San Jose Mercury News, Jan. 29, 1984, at 12A, col. 1. On the other hand, Richard Jalnike, a 17-year-old who shot his abusive father and was convicted by a jury of manslaughter, was sentenced to serve five to fifteen years in prison by the trial court, which refused to take the victim's behavior into account in imposing sentence. The Governor of Wyoming subsequently commuted the sentence to three years in a juvenile detention facility, noting that "the court record characterized the father as a cruel, sadistic man." Jalnike was portrayed as a victim. *Father Killer's Sent. 2 Reversed*, San Francisco Chron., June 15, 1984, at 30, col. 4.

259 *See* Cohn, *Oakes Gets 90 Days in Driving Deaths*, San Jose Mercury News, Aug. 13, 1983, at 1A, col. 5.

260 I. BESKOW, *supra* note 115, at 6–33 (language and cultural symbols influencing beliefs about rape); Berger, *supra* note 68, at 7–32 (1977) (summary of the history and rationale of the law of rape); Comment, *Police Detention and the Judgement That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968) (reflecting the old common law assumption that rape is a charge easily made and hard to defend, and recommending that police consider time between occurrence and report, physical appearance of "complainant," medical evidence, the complainant's conduct prior to the offense, evidence of weapons or struggle, information derived from a record check on

general deterrence remains a goal of the criminal justice system. Taking the victim's blameworthiness into account weakens the educational value of the criminal sanction and thus lessens its general deterrent effect.[261]

Recent victim's rights proposals appear to be driven more by the retaliatory view of retribution than by the moral aspect of retribution. The victim who participates in sentencing might further the ends of the retribution-as-vengeance theory by providing specific and graphic information about the crime—information that will provoke outrage.

Despite its popularity among victim's rights proponents, retaliation has received relatively little support from philosophers or social scientists.[262] Vengeance is uncivilized,[263] and it certainly cannot be said to appeal to the "higher nature" of man, yet the *"romantic version* of the vindictive theory . . . holds that the justification of punishment is to be found in the emotions of hate and anger, these emotions being those allegedly felt by all nor-

---

every complainant, the opinion of the complainant's husband or parents as to the truthfulness of her allegations, and the results of a polygraph examination of the complainant). *See generally* S. BROWNMILLER, *supra* note 18.

261. Although principles of comparative or contributory fault may justify the reduction of damages in intentional tort cases, *see* Dent & Epperson, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1, 29, 32 (1984), we may not be willing to incorporate notions of comparative fault in determining criminal penalties. The notion of general deterrence in tort is slightly different from the general deterrence justification in criminal cases; the state may be unwilling to weaken the educative effect of punishment by explicitly making criminal sentences dependent on the behavior of the victim.

On the other hand, California has provided that certain types of victim precipitation may be considered by a judge in determining what sentence to impose under the determinate sentencing law. A sentence may be mitigated if "[t]he victum was an initiator, willing participant, aggressor, or provoker of the incident," or if the defendant was reacting to "an unusual circumstance, such as great provocation . . . ." CAL. RULES OF COURT, Rule 423(a)(2), (3) (1985).

262. Revenge or retaliation is enjoying a renaissance, however. For example, a recent book advocates the use of revenge as a legitimate justification for the criminal sanction. *See* S. JACOBY, WILD JUSTICE (1983). Conservative columnist George Will writes that "[t]he element of retribution—vengeance, if you will—does not make punishment cruel and unusual; it makes it intelligible." Will, *The Value of Punishment*, NEWSWEEK, May 24, 1982, at 92. Advocates of the retaliation model of retribution tend to advocate its use for utilitarian reasons, however. *See* notes 264–276 *infra* and accompanying text.

263. To the extent that vengeance is associated with vigilantism, barbarity, lynching, and other depredations, the tendency has been to reject it as a justification for punishment. Similarly, to the extent that it is associated with historical punishments such as drawing and quartering and other forms of torture, it seems reflective of a less enlightened state.

mal or right-thinking people."[264] The retaliatory view of retribution ultimately is a utilitarian view, because its justifications are that it prevents mob violence, channels society's outrage, and preserves the legitimacy of the criminal justice system by paying heed to the community's sense of justice.[265] But none of these rationales adequately support retaliation, even from a utilitarian perspective. First, except in unusual or highly publicized cases, the likelihood of *mob* violence is almost nonexistent. Second, most crime—even core crime—does not provoke strangers to retaliate directly against the criminal. Third, although it may be proper to be angered by evil acts, it is not at all self evident that vengeance or retaliation is the only available or appropriate response for channeling society's outrage—another perfectly appropriate response to outrage would be to renew efforts to prevent violent crimes. Finally, some crimes transcend even outrage and *any* response may be futile in an instrumental sense.

Nor is it a simple task to determine what constitutes the community's sense of justice, and to ascertain whether that sense comports with the retaliatory view of retribution in most, if not all, instances. Whatever community feeling does exist could be reflected in ways other than vengeance—for example, through jury condemnation, police and prosecutorial discretion, and legislative determination of penalties. In general, only a very narrow category of crimes raises the issue of the community's sense of justice, and even in these cases the community may not agree on what is just. The controversy in New Bedford, Massachusetts during and after a rape trial indicates that sharp divisions in a community's sense of justice exist even in serious cases.[266]

---

264. Tenbergen, *Punishment*, in PUNISHMENT, *supra* note 252, at 8.

265. *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1508–11 (1974).

266. The New Bedford case involved a sexual assault that polarized the Anglo-Portuguese American community. The issues included age old beliefs about rape and ethnic prejudices. *See* Rangel, *Thousands March to Protest Bay Rape Conviction*, N.Y. Times, Mar. 24, 1984, at 7, col. 1; Connolly, *Naming of Victim in Rape Trial on TV and in Newspapers Prompts Debate*, N.Y. Times, Mar. 21, 1984, at 7, col. 5; Berk & Zalaznick, *Rape Trial: Justice Cancelled?*, NEWSWEEK, Apr. 2, 1984, at 39.

Another justification for retaliation is that it is necessary to ensure public respect for the law. The "law has an expressive function, expressing and thereby sustaining certain values." Wall, *supra* note 262, at 92. By deferring to "a common sense of justice," retaliation promotes respect for the law. *See* Schulhofer, *supra* note 265, at 1514. This is really no more than a general deterrence argument in retaliatory clothing. However, and it is not altogether clear that public, ritualized retaliation serves the function of enhancing respect for the law. Recall the public executions of pickpockets in England

The utilitarian justifications for the retaliatory view of retribution are inadequate. But what of the individual's desire for vengeance? Although few people would suggest a return to the blood feud, many would argue that the victim is entitled to his "pound of flesh." In this way, the victim may be entitled to tell the judge what he or she thinks should be done to the offender. The first and immediate criticism of this type of participation is that the victim's desire for vengeance conflicts with two principles that apply even to retributive sentencing: proportionality and equality. In an extreme example, while a victim may believe that an auto thief should be hanged and may muster a variety of moral arguments in support of his position, proportionality requires a rejection of the victim's position. Second, the equality principle requires similar treatment of similarly situated offenders in order to eliminate capriciousness in outcome.

The underlying assumption that anger and vengeance are different aspects of the same phenomenon and that vengeance is the necessary and appropriate response to the anger many victims experience also does not withstand close examination. A victim may direct anger at the offender, at the offense, at herself, or at a combination of these elements. Although anger is a justifiable response to crime, vengeance as a formalized manifestation of anger is of questionable psychological value to the victim. The anger experienced may therefore have little relevance to retaliation. Second, while anger is a normal and understandable response to all kinds of harms, anger does not inexorably lead to retaliation as an appropriate response to harm. Even if we can distinguish intentional harms from accidents, we still react with anger to hurt. We may even retaliate. But direct retaliation towards the perceived source of the harm is only one of many possible responses to the anger engendered. Finally, retaliation may be the victim's *first* impulse but not the last or the definitive one.[267] While the passage of time may not end a crime victim's anger, it may diminish the retaliatory impulse. Thus, what people choose to alleviate their feelings of anger, particularly after the initial shock of the harm has passed, can vary enormously from physical retaliation to withdrawal, to efforts to prevent future harms, to forgiveness of the offender.[268]

Anger and its manifestation as blame certainly *are* normal responses to violent crime, but they are not necessarily tied to a desire, need, or justification for retaliation. Disaster victims often try to assign responsibility for an evil, many times in a way that relieves them of responsibility for the outcome. Thus, victims of crimes often blame the perpetrator, "the system," the police, the district attorney, the defense lawyer, or all of them for the victim's agonies.[269] But blame does not relieve a victim of responsibility for the criminal act, if any, and for what he or she chooses to do about it.[270] As discussed earlier, victims who assume a degree of responsibility for a crisis or disaster may suffer less stress and may reduce their sense of vulnerability and loss of control more successfully than those who do not.[271] Assigning responsibility to others may also help the victim to find an explanation for the victimization. The victim's question "why" may be

where the brethren of the condemned circulated in the crowds, picking pockets. *See also* M. Foucault, Discipline and Punish 58–65 (1979) (public executions used to solidify authority of sovereign more than to express "common" sense of justice).

267. The wife of a Stanford University mathematics professor who was murdered observed: "My own personal philosophy based on my spiritual beliefs and on my psychological beliefs is that there is no point in hanging on to hatred and fear . . ." Madison, *No Hatred for Killer, Widow Says*, Peninsula Times Tribune, Jan. 21, 1981, at B1, col. 1. George Wallace has stated that he has forgiven the man who tried to assassinate him. *Wallace Renews Ex-Foe's Pardon*, San Jose Mercury News, May 15, 1984, at 3A, col. 4. Relatives of victims, on the other hand, frequently do become intensely involved in seeking vengeance. *See, e.g.*, Burress, *Angry Son Vows to Attack Mother's Killer in Court*, San Francisco Chron., Feb. 11, 1981, at 3, col. 1 (son of murder victim vowed to attack defendant after judge overruled jury verdict to impose death penalty); Foley, *"Symbolic" Trial to Begin in L.A.*, San Jose Mercury News, Oct. 9, 1983, at 1A, col. 4 (mothers of victims expressing rage at criminal justice system and supporting death penalty).

268. *Compare* Bilby, *Maximum Drunk Driving Term Given*, Denver Post, June 6, 1984, at 9A, col. 1 (mother of victim of drunk driver "said her feelings for the man who killed her son have turned from hate to pity"), *with* Anderson, *Missing Children's Center Gets Funding*, San Jose Mercury News, Apr. 19, 1981, at 2A, col. 5 (John Walsh, father of murder victim, became "crusader on behalf of missing kids" and lobbied for legislation) *and* sources cited in note 267 *supra*.

269. A man who survived a murder attempt, but whose fiancee was killed during the attack, remains outraged at the criminal justice system. The outrage has generalized to anger at defense lawyers in general. *See* Mandel, *Crime Victim, Legal Victim, Ironic Crusader*, San Francisco Chron., Jan. 16, 1983, at A2, col. 1.

270. *See* notes 129–136 *supra* and accompanying text. At the time of this writing, a considerable amount of controversy surrounds the shooting of four black teenagers on a New York subway by Bernhard Goetz, a man who had been mugged by three blacks several years before. Did Goetz shoot the four young men because of rage, an urge to retaliate, or fear produced by the prior incident? It would be foolish to speculate on the effect of his prior victimization at this time, the shooting of four people in a subway appears to be an extreme response, particularly if it is true that Goetz fired a second shot into an apparently disabled youth. Stengel, *A Troubled and Troubling Life*, Time, Apr. 8, 1985, at 35.

271. *See* text accompanying notes 129–135 *supra*; *cf.* Miller & Porter, *supra* note 122 (acknowledging that their own behavior may have contributed to assault enabled victims to reassert control and autonomy).

answered by blaming the parole officer of an offender who committed the crime while on parole,[272] or by blaming a judge for releasing an offender on bail.[273] But such explanations ultimately do not provide a lasting or sufficient answer to the broader question of meaning.[274] Indeed, the opposite of vengeance—forgiveness—is more likely to enable the victim to recover. As Hanna Arendt observes:

> [F]orgiveness is the exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequence of the first misdeed, everybody remains bound to the process . . . . In contrast to revenge . . . the act of forgiving can never be predicted, it is the only reaction that acts in an unexpected way and thus retains . . . something of the original character of action. Forgiving, in other words, is the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it and thereby freeing from its consequences both the one who forgives and the one who is forgiven.[275]

Forgiveness alone retains the uncontested authorship essential to responsibility and resolution. Forgiveness, rather than vengeance may, therefore, be the act that eventually frees the victim from the event, the means by which the victim may put the experience behind her.

Emphasizing individual vengeance and blame can undermine, rather than facilitate, recovery from a violent crime. This is not to say that victims can or should be indifferent to the sentence imposed; the rare disproportionately light sentence disaffirms the victim's experience and undoubtedly causes the victim more pain.[276] But even a harsh sentence does not end the matter for the victim. In a sense, sentencing does provide a recognizable

272. *See, e.g.*, *Crime Victims' Agony*, *supra* note 155 (detailing testimony at Senate Judiciary Committee subcommittee hearing by victims and relatives of victims advocating abolition of parole).

273. The bail issue has also led to the adoption of preventive detention statutes. *See* notes 170–172 *supra*.

274. *See* notes 119–147 *supra* and accompanying text. The questions of good and evil are not easily answered, indeed, most explanations fall woefully short of providing any lasting understanding. Each individual is ultimately responsible for answering his or her own "why."

275. H. ARENDT, THE HUMAN CONDITION 240–41 (1958).

276. *Compare* Cabo, *supra* note 259 (daughter of a man killed by a drunk driver, who was "on the verge of tears" after apparently lenient sentencing, was quoted as stating, "He'll never, ever realize what he did"), *with* Bilby, *supra* note 268 (mother of the victim said the judge "'did all he could do'").

event and possible opportunity for completion of a phase of the recovery process. But to say to a victim that after sentencing he or she can now put the experience to rest denies that any remaining questions of meaning, fears of death, or feelings of helplessness exist.[277] While the sentencing may signal the end of public concern with the crime, it surely cannot be expected to signal the end of the victim's recovery process.

If the harm to the victim is determinative of a particular sentence, then victim participation in sentencing would appear to be of use to the criminal process. But none of the rationales that underlie the criminal sanction are necessarily furthered by considering the *individual* harm in imposing a sentence. Moreover, concentrating on the harm to a specific victim may increase, rather than decrease, capriciousness in sentencing.

B. *The Relevance of Harm*

The Federal Victim and Witness Protection Act provides that the presentence report "shall contain . . . information concerning any harm, including financial, social, psychological and physical harm done to or loss suffered by any victim of the offense."[278] Although the record of the hearings before the Criminal Law Subcommittee of the Senate Judiciary Committee indicates that a major reason for including this information was for purposes of determining restitution,[279] the appendix to the hearings emphasizes that statements concerning the actual harm caused are "useful tools in determining equitable penalties during the sentencing of a convicted offender."[280]

Often the substantive law defines the criminal offense and the sanction to be imposed by the actual harm that has resulted. The definition of an offense frequently depends on the result of the conduct—simple battery, aggravated assault, and murder all encompass particular results within their definitions. And legislatures provide for penalties that correspond in severity to the harm associated with the prohibited behavior.[281] This emphasis

277. *See* notes 146–148 *supra* and accompanying text.

278. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (amending 18 U.S.C. § 3146(f)).

279. *Omnibus Victim's Protection Act: Hearing on S. 2420 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 55 (1982) [hereinafter cited as *Senate Hearings*].

280. *Id.* at 171.

281. Within wide limits, the eighth amendment prohibition against cruel and unu-

on outcomes makes some sense, both intuitively and philosophically: The principle of proportionality requires us to punish murderers more severely than petty thieves, as does the principle of relative moral blameworthiness. Beyond these rather general formulations, however, the justifications for emphasizing the particular harm inflicted in determining the sanction to impose become more problematic.

One commentator has countered many of the arguments offered in support of taking the particular harm into account at sentencing by showing how this approach is inconsistent with the moral retributionist rationale for the criminal sanction,[282] how it does not necessarily further deterrence,[283] and how it does not influence the incidence of jury nullification or reduce the problems of discretion in the criminal justice system.[284] Moreover, the "frugality principle"—the notion that punishment "can be justified only by necessity and should be no greater than necessary to achieve its goal"[285]—cannot support reliance on the particular harm as the exclusive reason for imposing punishment.[286] Thus, the only rationale for the criminal sanction with which emphasizing the particular harm is consistent is that of retaliation.[287]

Focusing on the particular harm caused emphasizes retaliation. This appeal to personal vengeance may be necessary to elicit the victim's cooperation with the prosecution in some cases, but not all. Victims may cooperate because of feelings of social duty or altruism as well. And whether formalizing individual retaliation at the sentencing stage is beneficial either to victims or to society is questionable.[288] Explicit encouragement of a victim's urge to retaliate does not necessarily aid the victim's recovery and, as noted earlier, may foreclose the possibility of taking re-

sonal punishments may require legislatures to maintain the relationship between harm and punishment. *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983) (life sentence without possibility of parole under habitual offender statute disproportionate when underlying offenses are not serious or violent); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty is grossly disproportionate punishment for rape).

282. Schulhofer, *supra* note 265, at 1545.

283. *Id.* at 1549–52.

284. *Id.* at 1522–62.

285. *Id.* at 1562 (citing J. Bentham, An Introduction to the Principles of Morals and Legislation 191 (1876)).

286. *Id.* at 1562–85.

287. *Id.* at 1508–10.

288. *See* notes 264–276 *supra* and accompanying text.

sponsibility for the experience. From society's perspective, the state attempts to mediate among individuals in order to prevent vigilantism and runaway vengeance, and a greater focus on individual retaliation may thwart this goal.

Thus, while retaliation is the only rationale for the criminal sanction with which victim participation at sentencing and an emphasis on the particular harm are consistent, this rationale is problematic for both the victim and society. And ironically, while victim's rights advocates have urged victim participation in sentencing for the purpose of apprising the sentencer of the specific harm caused, mandatory or determinate sentencing laws may render the information provided largely irrelevant.[289] Nonetheless, the victim may have an interest in being heard independent of the reasoning behind the criminal sanction.

C. *Other Possible Justifications for Victim Participation*

Although the individual contribution that a victim can or should make to the determination of the criminal sentence may be minimal at best, other justifications for victim participation may still exist. These justifications for a "right" to participate fall loosely into three categories: "fairness," "due process," and "recognition."

1. *Fairness*

Victims of core crime are individuals, while the criminal justice process is an amalgam of public agencies and courts with their own agendas, bureaucracies, and rituals. Yet the criminal justice process appears to ignore the concerns, wants, and needs

289. Although judges may have a range of sentencing options, that range is becoming increasingly narrowed by the legislatures. The change in focus from rehabilitation to retribution as the primary justification for the criminal sanction has led to the end of indeterminate sentencing. *See* S. Kadish, S. Schulhofer & M. Paulsen, *supra* note 60, at 295; O'Leary, *Criminal Sentencing: Trends and Tribulations*, 20 Crim. L. Bull. 417 (1984); *see also* Casper, *supra* note 62, at 233–37. Legislatures now set minimum mandatory penalties, often with precise detail, to limit judicial discretion in imposing sentences. *See, e.g.*, Cal. Penal Code § 1170 (West Supp. 1985); Ill. Rev. Stat. ch. 38, §§ 1005-5-3(2), 1005-8-1 (1982); N.Y. Penal Law §§ 60.05, 70.00, 70.02 (McKinney Supp. 1984); 42 Pa. Cons. Stat. Ann. §§ 9712–17 (Purdon Supp. 1984); 1 Schwartz, New York Sentencing Charts 6–7 (1985). *See generally* Casper, *supra* note 62.

Indeterminate sentencing and discretionary probation thus have been replaced by determinate sentences and mandatory prison provisions. As more and more statutes sharply circumscribe the judge's discretion, the issues of the specific harm to the victims and victim participation become increasingly irrelevant.

of victims while it simultaneously relies on victims to function.[290] Sacrificing individuals to society's goals seems "unfair" to many; the treatment of victims as a means to an end seems wrong.[291] Victim participation in sentencing ostensibly cures this inequality by giving the victim "equal time." But if fairness or equality are the goals served by participation, waiting until sentencing to recognize the victim does not seem to cure the perceived evil of using the victim as a means to an end. If the real reason for encouraging victims to speak at sentencing is the desire for harsher sentences, the process continues to use the victim for an instrumental purpose. The use of the victim can be more subtle, however, because in many cases the victim participates either to a limited extent, or not at all, after reporting the crime and agreeing to press charges.[292] At best, it may be several months before a sentencing proceeding occurs, assuming that there is a conviction.[293] Thus, the victim may continue to be "used" without fair treatment for an extended period, because sentencing occurs at the end of the criminal process.

Symbolically, the defendant does appear to have an advantage in the criminal process: He has a lawyer, while the victim does not; he enjoys the protection of specific constitutional provisions, while the victim does not; he frequently is the focus of attention and concern—even if that attention and concern are entirely negative in orientation—while attention paid to the victim is typically nonexistent or dependent upon the victim's usefulness to the prosecution. The perception that defendants are somehow advantaged is thus difficult to dispel. The reality, however, is that most defendants have little or no real advantage either substantively or procedurally. And the fact that the defendant has one person ostensibly supporting and advocating his interests—his

290. *See Senate Hearings*, *supra* note 279, at 83 (statement of Marlene A. Young, Executive Director of the National Organization for Victim Assistance); *id.* at 187–92 (statement of Deborah P. Kelly, Department of Government and Politics, University of Maryland).

291. *See, e.g.*, Task Force, *supra* note 71, at 60, 64. The Task Force's *Final Report* recommends that victims be allowed to participate throughout the process. In its recommendations for prosecutors, the report emphasizes a victim-centered prosecutorial model. *Id.* at 63–71. *See also* Goldstein, *supra* note 72.

292. Although some have argued that the victim should have a greater role throughout the process, *see* note 291 *supra*, and some victims or relatives of victims have also wanted a more active role in prosecution, *see* Foley, *supra* note 267, it is not self-evident that all, or even most, victims want to be so involved.

293. This is a rough figure, as each state has different provisions for speedy trials, sentencings, and other criminal procedures.

lawyer—may be considered an advantage by some,[294] but viewed another way, representation is less an advantage than a necessity. Without counsel, the defendant is at a distinct disadvantage in the system; having counsel lessens, but does not obliterate, that disadvantage.[295]

Another possible argument that can be made in support of victim participation in sentencing is that such participation renders the sentencing process more democratic and thus will make the sentence imposed more reflective of the community's response to a crime. But the fact that democratic legislative bodies set sentences detracts from this argument. Nevertheless, the democratizing function may arguably be better served by allowing the victim and her friends and relatives to participate in sentencing in order to provide the judge with a sense of the community's norms and values in a particular case. The legislature is probably a better measure of those norms and values than is a judge, however, particularly when the judge is faced with a self-selected group of individuals who do not necessarily represent the norms of the community. In fact, if ensuring that community norms prevail is the goal, jury sentencing would be more representative than victim participation.[296]

294. One victim is quoted as saying: "Why do criminals have more rights than victims? They get to choose counsel and have these communications. . . . You are stuck with a lawyer they give you, you are left out of what's going on. . . ." *Senate Hearings*, *supra* note 279, at 189. In many instances, however, it is a total misperception that the "criminal" got to choose his or her own lawyer. An indigent defendant is assigned counsel by the court, and has little to say in the matter. Even though an accused has a right to counsel, the Supreme Court has made it clear that that right does not include the right to a "meaningful attorney-client relationship." Morris v. Slappy, 461 U.S. 1, 14 (1983). Indeed, I found that asking defendants if they had an attorney to a post-case usually produced the response, "No, I had a PD (public defender)."

295. The majority of defendants have no reason to perceive themselves as advantaged, especially if they remain in custody or are represented by public defenders often referred to as "chump trucks" by clients who see their lawyers as only wanting to make a quick deal. And when an indigent defendant does not meet his public defender until the day of his trial or has appointed counsel who does not know how to conduct a trial, "having a lawyer" is more illusory than real. *Cf.* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1163–71 (1982) (discussing adversary model as undermined by failure of courts to assure effective representation for indigent defendants).

296. The jury trial is unique to Anglo-American criminal procedure. It is a way of presenting at least the appearance of democratic, rather than hierarchical, decisionmaking. *Cf.* Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 492, 532–42 (1975) (comparing "liberal" English criminal procedures to hierarchical continental methods). While the use of the jury is not exclusively ideological—by

2. *Due process*

The "due process" rationale focuses on the victim's natural law rights to "life, liberty and property" and suggests according some procedural due process protection to victims.[297] The argument proceeds as follows: When an individual becomes a victim of a violent crime, that person's right to life or liberty (defined as security from harm) has been invaded. Although the due process clause is a check on government power, the government uses victims as witnesses, and victims can therefore claim a private interest in the outcome of a criminal matter. In this view, the government and the courts should provide procedural due process for victims.[298]

If the victim does have some right cognizable under the due process clause—natural, fundamental or substantive—that entitles him to a hearing, the question remains what kind of hearing. The procedural side of the due process clause arises in cases involving government attempts to deprive an individual of a constitutionally protected or legislatively granted right, or to burden this right in some way.[299] Procedural protections are generally required as safeguards against erroneous decisionmaking.[300] But the victim suffers no deprivation at the hands of the government during the sentencing process. The sentence does not formally foreclose any civil action for damages caused by the crime unless the victim agrees,[301] the sentence has no bearing on whether the victim's property will be returned,[302] and the sentence does not

---

mon, it has become custom or habit in the United States—there is an overlay of belief that a jury better reflects community values than does a judge

297. *Cf.* M. FEELEY, *supra* note 10 (arguing that the proper focus of criminal law is protection against crime, not protection of criminals)

298. *Id. see also* R. REISS, *supra* note 25

299. *See* P. BATOR & S. LEVINSON, PROBLEMS IN CONSTITUTIONAL DECISIONMAKING 719–46 (1983)

300. *See In re* Winship, 397 U.S. 358, 371–72 (1971) (Harlan, J., concurring). Generally, *Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1278 (1975)

301. A sentence might, however, practically preclude recovery. *See* notes 316–324 *infra* and accompanying text. A plea bargaining arrangement might ease recovery in some jurisdictions, however. California, for example, permits the use of a guilty plea or a "no contest" plea in a subsequent civil suit to prove that the defendant committed a felony. *See* CAL. EVID. CODE § 1300 (West Supp. 1985); CAL. PENAL CODE § 1016 (West Supp. 1985)

302. For example, the Santa Clara County, California, District Attorney's Office had a general policy of photographing the property of victims and returning the property to them whenever possible. By contrast, the San Mateo County, California, District Attorney's Office would retain property until after a conviction was affirmed on appeal

determine whether the state will restrain the victim's physical liberty.[303] Only the restitution context involves the adjudication of some cognizable claim belonging to the victim.[304] Thus, inquiry into the protection of a victim's due process rights because of an erroneous determination by the sentencing judge is unnecessary simply because the victim has no rights or entitlements at stake at sentencing.[305] To seek a justification for the incorporation of procedural due process rights for victims, despite the lack of identifiable *governmental* interference with an individual right, far exceeds the scope of even the Supreme Court's most expansive procedural due process applications.[306] And cluttering up sentencing hearings with additional procedures is not really what advocates of the crime control position seek. The protraction of sentencing proceedings runs contrary to the desire for efficiency and swift and sure punishment.

3. *Recognition*

"Recognition" is somewhat distinct from fairness or due process concerns. In one form, it may be defined as permitting the victim to speak in response to the appearance of unfairness of the present criminal process,[307] but it is largely a symbolic gesture. This type of recognition of the "individual dignity" of the victim, might have some merit in a utilitarian calculus. By giving victims

303. The President's Task Force seems to imply that a victim's physical safety and liberty may be affected by the release of an offender, at least in the context of parole. TASK FORCE, *supra* note 71, at 30, 81. Again, however, the *Final Report* vacillates confusingly among past victims who have a "deep and real" fear of retaliation and may want "to take precautions," and society's "responsibility for protecting the innocent." *Id.* at 81

304. *See* notes 311–318 *infra* and accompanying text

305. In a few instances, the release of an offender may pose a direct danger to the individual victim, but those instances will be rare. Even if we had criteria for determining general dangerousness—e.g., the likelihood that the interest in protecting future victims dictates that a given offender be incapacitated—general dangerousness is decidedly different from dangerousness to a specific individual. The difficulty of separating a victim's understandable fear of, and perception of threats from, the offender from actual threats to the individual would make rational sentencing very difficult, if not impossible, in the vast majority of cases. In cases involving domestic violence, where the offender has clearly directed his behavior toward a given individual or individuals, dangerousness may be more predictable

306. Perhaps this is why the President's Task Force recommended amending the sixth amendment to the United States Constitution to provide explicitly for victims' rights. *See* TASK FORCE, *supra* note 71, at 113–15

307. This basis for recognition could be characterized as an "individual dignity" argument. As Jerry Mashaw has observed:

> State coercion must be legitimized, not only by acceptable substantive [ ] ses.

a voice, this type of recognition could increase the social welfare by encouraging victims to report and prosecute crimes. But whether or not victims are encouraged to help the police and the prosecution may depend more on whether victims have been treated with dignity earlier in the process, or throughout the process, than on whether they participate at sentencing. Moreover, although recognition of the individual's experience in a formalized setting is theoretically possible, great care must be taken to ensure that any existing problems of victim alienation are not exacerbated by perfunctory treatment, or alternatively, by uninformed responses such as blaming victims for their predicaments or telling them that now they should "put it all behind them." Finally, because both practical and theoretical considerations may preclude the sentencer from implementing the victim's wishes, some victims may discover that their opinions are meaningless to the outcome and become more embittered.

Recognition also ensures some public validation of the victim's experience—the lending of a sympathetic official ear—but validation may not be a workable justification for victim participation, and it suffers from some of the same flaws as the symbolic gesture form of recognition. Moreover, public validation may not be very useful to many victims who are more interested in obtaining validation from a more specific reference group, such as their friends or family. Overall, there appears to be little justification for victim participation in the determination of the criminal sanction. However, victims may have a more limited role to play—that of helping the court to determine "restitution." Although determining the amount of restitution that an offender should pay may not necessarily mandate the victim's actual presence at sentencing, it certainly requires some victim involvement. The next section discusses victim participation in determining restitution, and observes that participation only serves to emphasize the problematic nature of "victim's rights."

---

but also by political processes that respond to a democratic morality's demand for participation in decisions affecting individual and group interests . . .

. . . To accord an individual less [than a hearing] when his property or status is at stake requires justification . . . because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable . . .

Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 49–50 (1976) (footnotes omitted).

D. *The Riddle of Restitution*

While many propositions advanced on the behalf of past victims may be of marginal concern to them, compensation for injuries can be of central importance. If crime victims have "rights," the right to recover from the wrongdoer is the most tenable individually based right. Restoration of the victim to the *status quo ante* is what the tort system is supposed to accomplish, and its failure to do so in instances of criminal harm has led many commentators and politicians to advocate grafting tort principles onto the criminal law, typically at the sentencing stage.[308] Both the California Victim's Bill of Rights,[309] and the Federal Victim and Witness Protection Act have made restitution an issue at the sentencing stage.[310]

1. *Restitution as paradox.*

Few would quarrel with the proposition that, in an ideal world, the person who does harm should compensate the victim. This premise is the basis of the tort system, which in theory provides victims of crimes with compensation for their injuries.[311] As a theoretical matter, the civil courts are the proper forum for victims to claim damages.[312] The current emphasis on restitution has blunted the theoretical separation between crime and tort, although restitution is not a complete substitute for a tort action. Usually defined in terms of actual damages and restoration of property,[313] restitution generally does not encompass broader tort concepts such as damages for pain and suffering.[314] Nor do victim's rights laws expand restitution to include these broader damages.[315]

---

308. *See, e.g.*, Cal. Const. art. I, § 28(b), 18 U.S.C. §§ 3579, 3580 (1982), Ariz. Code § 13-18-67 (1982), Cal. Penal Code §§ 1191.1, 1191.2 (West Supp. 1985), Iowa Code Ann. §§ 910.2, 910.3 (West Supp. 1985). *See generally* Harland *supra* note 72, at 69–75.

309. Cal. Const. art. I, § 28(b).

310. 18 U.S.C. §§ 3579, 3580 (1982).

311. *See, e.g.*, note 26 *supra*.

312. Many advocates of mandatory restitution have asserted that requiring the victim to pursue a civil remedy is unnecessarily burdensome and duplicative, and have disputed the historical distinction between criminal and civil law. *See, e.g.*, S. Schafer *supra* note 86; Laster, *Criminal Restitution: A Survey of Its Past History in* Restitution, *supra* note 36, at 19–28; Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933–37 (1984).

313. Harland, *supra* note 72, at 60–61.

314. *Id.* at 86–89.

315. The federal restitution provision, enacted as part of the Victim and Witness

The Federal Victim and Witness Protection Act provides that the sentencing judge "may" order restitution and "shall" state his or her reasons "on the record" if he or she does not do so.[316] The California Victim's Bill of Rights goes further, stating that "[r]estitution shall be ordered . . . in every case, regardless of the sentence or disposition imposed . . . unless compelling and extraordinary reasons exist to the contrary."[317] The wording of both the federal and California provisions seems to suggest that the victim's right to restitution "trumps" the state's right to impose the criminal sanction.[318] But a fundamental tension exists between the imposition of the criminal sanction and access to monetary remedies for victims—frequently the use of one negates the use of the other. If restitution is to be more than a symbolic but empty promise to past victims and an assurance for future victims, either the private interest in recovery has to prevail, or an accommodation between public and private interests has to be created.

When serious crimes are involved, the public interest will almost inevitably foreclose either allowing private interests to prevail or accommodation. As the criminal law has evolved, its nature and function has become increasingly social and public, and the criminal process now serves the frequently interrelated public tasks of preventing crime and punishing offenders. The justifications for the criminal process and the characteristics that distinguish criminal law from all other law focus on these two tasks.[319] The increasingly public nature of the criminal law is

Protection Act of 1982, provides for restitution of uncompensated costs, including damage or loss of property, payment of medical and psychiatric care, funeral expenses, and lost income. 18 U.S.C. § 3579(d), (e) (1982). *But see* ALA. CODE ANN. § 15-18-65, -66 (1982) (all perpetrators of criminal activity are to compensate for "pecuniary loss," damage, or injury. "pecuniary loss" is defined as "all special damages which a person shall recover against the defendant in a civil action"); ARIZ. REV. STAT. ANN. § 13-603(C) (Supp. 1984) (requiring restitution "in the full amount of economic loss as determined by the court and in the manner as determined by the court after consideration of the economic circumstances of the convicted person"); MD. REV. STAT. ANN. art. 27-A, § 11(2)(a) (1983) ("restitution" defined as monetary or in-kind reimbursement for "economic loss").

316. 18 U.S.C. § 3579(a)(2) (1982).

317. CAL. CONST. art. I, § 28(b). It further provides that victims be heard at sentencing for the purpose of determining restitution. CAL. PENAL CODE § 1191.1 (West Supp. 1985).

318. *Cf.* Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 136 (S. Hampshire ed. 1978) (preservation of a true liberal system requires that individual rights occasionally trump the economic market and political democracy).

319. Deterrence, rehabilitation, and incapacitation are all aimed at crime prevention, a public function. Retribution also serves a public function, either as a utilitarian means of handling public outrage or as an irreducible, morally good public response to wickedness. *See* notes 251–258, 262–264 *supra* and accompanying texts.

largely a result of our acknowledgement that many crimes have profound effects not only on individuals, but also on the community as a whole. While the distinction between public and private rights is not a particularly satisfactory one, in the instance of core crime, the distinction seems worth preserving.[320] The community has interests in its security and continued existence that are fundamentally affected by war, disasters, and violent crimes. If individual victims are permitted to dictate the choice of sanctions, the community will be virtually excluded from protecting itself from the disruptive impact of crime.

The criminal sanction is the community's response to crime. Because core crime transcends the interests of the harmed individual, the criminal event "belongs" to others as well. Accordingly, the larger community protects its interests by prohibiting private settlements of criminal cases,[321] encouraging community-wide participation in crime prevention,[322] and defining the ap-

320. In fact, the University of Pennsylvania found the subject serious enough to publish an entire symposium on the public/private distinction. *The Public, Private Distinction*, 130 U. PA. L. REV. 1289 (1982). It may be of note that none of the participants in the symposium addressed the public/private distinction in the area of criminal law, on the other hand, Duncan Kennedy acknowledged two centuries of criminal law in his comment on Paul Brest's contribution. Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1360 & n.2 (1982). Perhaps we are all so accultimated into believing that criminal law is public that we don't really think of it automatically when we think of attempts to distinguish "private" from "public." Or at least I am so accultimated that I am convinced that criminal law is inescapably collectively oriented rather than individually oriented. Nozick's argument that compensation to one person does not reassure others who are frightened and does little to stabilize the environment in which individuals live is a good one insofar as it recognizes the importance of the distinction. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA 57–87 (1974); *see also* H. ARENDT, EICHMANN IN JERUSALEM 260–61 (rev. ed. 1965) (crime is a wrong against the community whose law is violated).

321. Many criminal codes forbid such things as "misprision" or "obstruction of justice," often in broad terms. *See, e.g.*, 18 U.S.C. §§ 1503–1512, 17 (1984); ARIZ. REV. STAT. § 13-2409 (Supp. 1984); MASS. ANN. LAWS ch. 264, § 1 ch. 268 § 13B (1970); *cf.* CAL. PENAL CODE § 153 (West Supp. 1985) (compounding or concealing a crime).

322. One frequent criticism of the Uniform Crime Index is that it fails to reflect the "true" rate of crime because of nonreporting, among other things. Linked to the problem of nonreporting is the belief, if not the certainty, that crimes that go unpunished lead to an increase in the crime rate. Thus, studies are conducted to determine how to increase citizen reporting. *See* W. SPELMAN & D. BROWN, *supra* note 174, and victim's compensation has been pushed in part because of a posited incentive to increase re-

propriate sanctions or range of sanctions for particular crimes.[323] The community's protection of its right to exist, as manifested by its imposition of the criminal sanction, will therefore often negate the interest of the victim in recovering from the offender. This is the case, for example, when the community chooses to imprison someone on retributive or incapacitative grounds.

Any unspoken hesitancy to allow the victim's right to recover from the offender to dominate the sentencing determination may explain the attempts to define restitution concepts in terms of the traditional justifications for the criminal sanction in an effort to resolve the paradox created. Proposals for restitution or state compensation for injuries have existed for centuries and these proposals have drawn heavily on the traditional justifications for the criminal sanction. Bentham's utilitarian scheme, for example, called for "satisfaction," a combination of restitution and compensation: reparation for past injury and assurance to society, in order to promote a feeling of security, that suffering will not go unrecognized.[324] Garofalo argued that mandatory restitution would deter criminals by raising the crime tariff, save money, and lead to reformation of some criminals.[325] Thus Bentham and Garofalo suggest that even in the narrow sense of reparation, compensation to victims is not a good end in and of itself. It also must serve the public purposes of the criminal law, particularly those of deterrence and rehabilitation.

In spite of the critiques of rehabilitation, some liberal supporters of restitution have stressed its value as a rehabilitative tool. Some have argued that restitution personalizes the context

posting of crimes and to increase victim cooperation; *see* R. ELIAS, *supra* note 72, at 251, 250 n.21.

A relatively recent development that encourages public participation in crime prevention is the "Neighborhood Watch" program, in which members of the community monitor suspicious activity. But neighborhood watch programs, citizen patrols, and other community-based, public responses to the crime rate do not appear to have substantially reduced crime, although they "can at the very least help pull a neighborhood together and improve its sense of security." Currie, *supra* note 29, at 23.

323. Thus, the Supreme Court has granted legislatures wide latitude in determining what sanctions to impose for what crimes. Rummel v. Estelle, 445 U.S. 263, 274–76 (1980) (reluctance to review legislatively mandated terms of imprisonment under eighth amendment). *But see* Solem v. Helm, 463 U.S. 277 (1983) (while courts should grant substantial deference to legislatures, no penalty is per se constitutional).

324. Bentham, *Principles for the Civil Code*, in READINGS, *supra* note 36, at 29.

325. Garofalo, *Enforced Reparation as a Substitute for Imprisonment*, in READINGS, *supra* note 36, at 43.

of a criminal sentence, keeping the offender in contact with the victim, so that he or she can see the consequences of the criminal acts. Restitution arguably personalizes the sentence and increases the offender's awareness of responsibility and remorse, thereby aiding his rehabilitation.[326] Whether restitution orders under the threat of imprisonment do serve a rehabilitative function is an open question. Other variables, such as availability of work and other sources of financial support for the offender undoubtedly influence the effectiveness of restitution as a rehabilitative device.

The deterrence argument for restitution is based on a "crime tariff" model that assumes that if the price of crime is high enough, potential offenders will refrain from committing crimes.[327] Perhaps offenders would be more deterred by the prospect of having to suffer financially rather than physically, but this hardly seems likely. Most offenders given the choice between making restitution and going to jail would probably opt for restitution.[328]

The retributionist impulse touched off by conservatives has taken the form of mandatory imprisonment for offenses, longer prison terms, and determinate sentencing. None of these enhance the likelihood of the offender making the restitution that conservatives also demand.[329] For example, although the Senate hearings on the issue of restitution reveal some recognition that the desire to punish offenders and the desire to compensate victims are frequently contradictory, the Senate ignored the contra-

326. *See, e.g.*, L. FULLER *supra* note 72, at 249 (1980). Fuller also points to the debilitating effects of prison and the expense of imprisonment as further reasons to adopt restitution schemes. *Id.* at 136–38, 307.

327. Kelman, *supra* note 28, at 215–16.

328. Restitution has been used most frequently as a condition of probation. *See* Harland, *supra* note 72, at 57, 69–75. But it might also be used to escape criminal liability altogether under a so called "civil compromise" statute. *See, e.g.*, CAL. PENAL CODE § 1378 (West 1982) (victims may "compromise" misdemeanors by acknowledging satisfaction for injury); *see also* Harland, *supra* note 72, at 65. Most offenders, given the choice between jail and probation, probably prefer probation and restitution. Although I found no empirical evidence on this subject, my own clients almost always chose restitution over jail.

329. At present, a person in prison has no opportunity to earn the money necessary to make restitution. Even where prisoners do work, the profits are used primarily to defray the expense of feeding and housing inmates, and prisoners' wages are minimal. Moreover, private industry and labor resent the competition of prison industries. "[N]obody wants to see prison shops opened in their market." *See* Schilling, *Prison Shops Have 'Edge,' Foes Say*, Rocky Mountain News, Dec. 25, 1983, at 97, col. 1.

diction in enacting the Federal Victim and Witness Protection Act.[330]

On the liberal side, some advocates of restitution have advocated using restitution as a fine-like punishment imposed instead of imprisonment, because restitution provides a direct method of reminding the criminal of the wrong and forcing an acknowledgement of moral responsibility.[331] At first blush, this seems ideally suited to moral retributionist goals, but in instances of serious crime, it is unworkable. As a society, we want the rapist, mugger, or robber imprisoned on proportionality and incapacitation grounds;[332] in many instances, the victim does also.[333] In cases in which we are indifferent about punishing offenders through imprisonment or fines, restitution through fines may make sense. But restitution is not so much a "punishment" as it is an amends for wrongdoing. Punishment, by definition, should be an unpleasant "extra" that serves no purpose other than to inflict pain or suffering.[334]

330. A submission to the Subcommittee on Criminal Law of the Senate Judiciary Committee by Ronald A. Zweibel, Chairman of the New York State Crime Victims Board and President of the National Association of Crime Victim Compensation Boards, provides a good example of this tendency. The submission noted the problems of both civil and restitutive recovery but utterly failed to acknowledge that restitution is often no more than an unrealistic goal: "[T]he realities of recovering losses from a criminal offender, who may be judgement proof, incarcerated or indigent, are not particularly promising. . . . Although encumbered by some of the same practical problems as encountered with civil recoveries, restitution at least provides an alternative avenue for securing this basic right." *Senate Hearings*, *supra* note 270, at 172.

331. *See* L. Fobes, *supra* note 72, at 803. *But see* Dattenhofer & Ericson, *The Victim/Offender Reconciliation Program: A Message to Correctional Reformers*, 33 U. Toronto L.J. 315, 316–17 (1983) (community program in which offender and victim meet and agree on restitution amount and terms is not a clearly better alternative to jail).

332. There are other problems with restitution as well. For one thing, many offenders lack legitimate means to pay restitution, and may resort to other methods of providing for the money to meet restitution payments rather than go to jail. Second, if an offender legitimately lacks the means to make restitution, it may not be possible to incarcerate him. *See* Bearden v. Georgia, 461 U.S. 660, 668–69 (1983) (state may not imprison probationer who has made "all reasonable efforts" to pay fine or make restitution as condition of probation "without considering whether adequate alternative methods of punishment are available").

333. Given a choice between receiving restitution or seeing the offender punished or incapacitated, the victim of a core crime is likely to *want* both, but will settle for something less. Given the cultural association of crime with punishment, many victims will arguably prefer punishment; some victims may want the offender incapacitated for more "altruistic" reasons such as the protection of the community. Thus, even from a pure victim orientation, restitution may not be as important as is often assumed.

334. Although physical torture has largely been replaced by deprivation of rights and wealth, M. Foucault, *supra* note 266, at 7–15, the deprivation is still punishment, reaffirming power relationships and social control, and inflicting pain. It is a negative stimulus. As such, pain or suffering, however short, is a part of punishment.

2. *California's attempt to resolve the paradox*

The California legislature explicitly recognized the paradoxical nature of restitution in 1983 when it had to reconcile the Victim's Bill of Rights amendment to the state constitution requiring restitution in all cases with California's constitutional and statutory requirements of increased and mandatory prison terms.[335] Conservative Republicans insisted that individual offenders be required to make restitution regardless of imprisonment or ability to pay.[336] Where necessary, they were willing to require payment of restitution as a condition of parole, essentially taking the position that the offender, and *only* the offender, is responsible for providing the victim with a financial remedy.[337] Under the

335. The Victim's Bill of Rights made restitution mandatory, *see* Cal. Const. art. I, § 28(b), and lengthened sentences in cases where an offender had a prior conviction for a felony, no matter how old the prior felony conviction, *see id.* at § 28(f). *Cf.* Cal. Penal Code § 667 (West Supp. 1985) (requiring a five-year sentence for each prior "serious felony" conviction to run consecutively to sentence for new "serious felony" conviction); *see also* California Legislative Assembly Committee on Criminal Justice, Analysis of Proposition 8, at 28, 31–32, 42–48 (1982) (arguing that "[s]ignificantly [l]onger [s]entences" would result under Proposition 8). The California Determinate Sentencing Law, together with individual provisions requiring *mandatory* prison sentences for a number of offenses, already existed when Proposition 8 passed. *See* Cal. Penal Code § 1170 (1977).

336. Paul Gann, a co-author of the Victim's Bill of Rights, stated: "The favors just about any effort to get restitution money from convicted felons, including confiscating money or property," and went on to observe: "If they commit a heinous crime, like rape or murder, as far as I'm concerned they can get the money selling their blood if somebody will buy it." Norman, *Traffic Tickets May Help Pay the Bills for Victims of Crime*, Peninsula Times Tribune, June 4, 1983, at A1, col. 1, A8, col. 1. Republican legislators "introduced legislation that would require convicted adults and juveniles to repay their victims, either directly with money or goods, or indirectly through community service." Stanton, *A Proposal to Pay Victims of Crime*, Peninsula Times Tribune, May 29, 1983, at A1, col. 1, but they ultimately agreed to Democrat-sponsored legislation, *see* notes 340–343 *infra* and accompanying text.

337. Senate Bill 593, introduced by Senator Dolnite and co-authored by Republican Assemblyman Nolan, would have provided that courts impose a mandatory "restitution penalty" of between $50 and $100,000. S. 593, 1983 Cal. Legis., Regular Session, at 5 (June 17, 1983) (amended in assembly, July 15, 1983). If the offender were sentenced to prison, the Director of Corrections would have been required to withhold 50% of the prisoner's income and transfer it to the State Board of Control to be placed in a restitution trust account. *Id.* at 8–9. The Board of Prison Terms, in considering parole, would have to determine a payment schedule for "remaining restitution penalty"; parole could be revoked if the restitution payments were not made, and parole terms could be extended up to 15 years in order to assure payments. *Id.* at 8. The majority leader of the Assembly referred to the Republican proposals as "unworkable and 'hoax like,'" concluding that the Republican package "offers a false hope that everybody will get restitution for a crime." *Democ Would Make Criminals Pay Tax for Restitution*

conservative plan, and in light of California's existing mandatory sentencing structure, a victim who suffered serious bodily injury as a result of a forcible rape in which the perpetrator used a deadly weapon would have to wait a *minimum* of approximately ten years, eight months, before the assailant would be eligible for parole[338] and, perhaps, be able to earn money to make restitution payments. Such a "resolution" of the restitution paradox is no resolution at all.

Liberal Democrats sought to increase the amount of funds available to victims under the California Victims of Violent Crime Compensation program[339] by recharacterizing it as a victim's restitution fund, financed by penalty assessments charged in addition to fines in all criminal cases.[340] The Democrats additionally proposed changes in the law involving tort suits for damages, including extending statutes of limitations, providing for punitive damages in wrongful death suits, and increasing the civil liability of parents whose children commit a crime.[341]

The "restitution fund" places a tax on all criminal activity: a mandatory payment to the restitution fund of $5 assessed for every $10 of criminal fines in misdemeanor cases, a mandatory assessment for felony convictions ranging from $100 to $10,000, and a $20 assessment imposed on those convicted of driving

Funds, San Francisco Examiner, Mar. 28, 1988, at B12, col. 1, § ; *accord Should a Restitution Penalty Be Levied in Criminal and Juvenile Cases to Be Paid into a Separate Account for the Benefit of the Victim?*, Memorandum by Byron D. Sher, Chairman of the California Assembly Committee on Criminal Law and Public Safety (1985) (on file with author).

338. This is based on the maximum, "aggravated," eight-year term, *see* CAL. PENAL CODE § 264 (West Supp. 1985), for violation of the statute, *see id.* at § 261 (West Supp. 1985), a five-year consecutive enhancement for great bodily harm, *see id.* at § 12022.8 (West 1982), and a three-year enhancement for use of a deadly weapon, *see id.* at § 12022 5. The maximum sentence is thus 16 years. With one-third of the sentence reduced by good time/work-time credits, *id.* at §§ 2931, 2933 (West Supp. 1985), 10 years and 8 months would be the minimum sentence the offender would have to serve.

339. CAL. GOV'T CODE §§ 13960–13974 (West Supp. 1985).

340. *See* CAL. GOV'T CODE §§ 13959, 13960.1, 13967 (West Supp. 1985); H.R. 1485, 1984–1984 Cal. Legis., Regular Sess., 56–68; Ashby, *Assembly Passes Bills on Restitution to Crime Victims*, L.A. Daily J., June 10, 1983, at 1, col. 2.

341. *See* Press Release by California Assemblyman Byron Sher (Sept. 12, 1983) (on file with author) [hereinafter cited as Sher]. In the press release, the sponsors of the "Crime Victim Restitution Program of 1983" stated: "The Restitution Fund would be financed by doubling current fine limits, ordering a restitution fine in every criminal case, and imposing heavy fines on drug offenders." Sher, *id.* at 1. California law now provides that restitution fines may be paid by withholding 20% of a prisoner's wages, a peculiar blend of the Republican's direct restitution idea and the Democrat's compensation fund model. CAL. PENAL CODE § 2085.5 (West Supp. 1985). *See also* Lynne, *Of Parking Violators and Victims of Violence*, Peninsula Times Tribune, Mar. 31, 1983, at A2, col. 1

under the influence.[342] Although conservatives initially opposed the plan in which traffic violators "subsidized" rapists and murderers, the proposal eventually gained bipartisan support and became law. The program that emerged was thus more like California's preexisting victim's compensation program, with increased funds to be supplied essentially by a tax on well-to-do offenders,[343] rather than a program of restitution by offenders.

3. *Some unanswered questions*

In those cases in which direct restitution by the offender to the victim is possible and is a sentencing issue, neither federal nor state provisions offer much guidance on the procedures for determining the appropriate amount of restitution. One commentator has recently argued that once a person is convicted, his or her rights "are merely conditional,"[344] and therefore no formal trial is necessary to determine the amount of restitution required.[345] The argument uncritically accepts that restitution is compatible with the justifications for the criminal sanction.[346] Because this article asserts that restitution is analytically different, the problem of procedure cannot be so lightly dismissed.[347]

The Federal Victim and Witness Protection Act recognizes due process questions associated with restitution by placing the burden of proving the amount in question by a preponderance of the evidence on the prosecution and the same burden of proof

342. *See* CAL. GOV'T CODE § 13967 (West Supp. 1985); CAL. PENAL CODE §§ 1463.18, 1464 (West Supp. 1985); CAL. WELF. & INST. CODE § 729.6 (West Supp. 1985).

343. One author has argued that this type of funding scheme furthers the goals of punishment and rehabilitation. *See* Linehan, *Legislative Assistance to Victims of Crime: The Florida Crimes Compensation Act*, 11 FLA. ST. U.L. REV. 859, 872 (1984), presumably because it is a form of quasi-restitution. But the distinction between payment of a restitution "fine" and other "fines" seems nonexistent. Moreover, it is not clear that restitution functions either as a rehabilitative device or as a punishment. Nor does "taxing" well-to-do offenders, primarily white collar criminals or drug dealers, seem to add to general deterrence.

344. Note, *supra* note 312, at 944.

345. *Id.* at 944–46.

346. *Id.* at 957–61.

347. I take issue with this argument for two reasons. First, as I have argued, *see* notes 324–331 *supra* and accompanying text, restitution is not supported by any of the rationales for the criminal sanction. Second, this argument ignores the fact that if a convicted offender is sued in tort, he does not sacrifice the procedural and evidentiary benefits that other tort defendants have. To treat him differently in the criminal context undermines the purpose of the safeguards in the civil context.

on the defendant to show his or her inability to pay.[348] On the other hand, it leaves the burden of "demonstrating such other matters as the court deems appropriate upon the party designated by the court as justice requires."[349] The reference to "appropriate matters" in this latter provision creates virtually complete judicial discretion in restitution proceedings. Moreover, the Act applies to harms resulting from "the offense" without defining whether the offense means all the offenses with which the defendant was charged, or simply the offense for which he or she was convicted.[350] Thus, the defendant could have to pay restitution for crimes of which he or she is not guilty.[351]

The situation on the state level may be worse than it is on the federal level. A recent article surveying restitution provisions throughout the United States found that many state plans failed to provide for due process protections for criminal defendants comparable to those available in civil actions against the criminal offender.[352] The option of restitution, either instead of a jail sentence or at least with the promise of a lesser term, makes it difficult for offenders to object to the amount of restitution awarded, however unfounded.[353] Moreover, many states have shifted the burden of proving the amount of reasonable restitution from the person seeking restitution to the offender.[354] The lack of procedural protection is troubling because it is symptomatic of a general willingness to treat offenders as "others" and not as persons entitled to the same consideration the law provides other wrongdoers who cause harms.[355]

348. 18 U.S.C. § 3580(d) (1982). For an argument that the determination of restitution should take place in the adjudicatory phase of the criminal process in order to protect the rights of defendants, see Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505, 516–17 (1984). The courts have also been unwilling to dispense with due process protections in the restitution area, although they have disagreed on what process is due. *Compare* U.S. v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983) (restitution order under Federal Victim and Witness Protection Act violates due process clause, seventh amendment right to jury trial, and eighth amendment prohibition against cruel and unusual punishment, because it might result in imprisonment for debt), *with In re* D.G.W., 70 N.J. 488, 361 A.2d 513 (1976) (due process encompasses a right to be heard at the sentencing hearing), *and* State v. Pope, 107 Wis. 2d 726, 321 N.W.2d 359 (Wis. Ct. App. 1982) (due process requires notice, an opportunity to be heard, and a right of confrontation).

The procedures for determining restitution that have been developed by courts and legislatures are not as protective as are existing procedures for civil cases. *See* Harland, *supra* note 72, at 99–108.

349. 18 U.S.C. § 3580(d) (1982).

350. *See* Note, *supra* note 348, at 509–11.

351. *Id.* at 517.

352. Harland, *supra* note 72, at 99–108.

353. *Id.* at 73–74, 105.

354. *Id.* at 100–08. Similarly, California's Victim's Bill of Rights did not address any substantive or procedural questions, but simply left it up to the legislature to determine how the restitution provisions should be implemented. Although the legislature has created the Crime Victim's Restitution Fund, it has yet to provide a procedural framework for reaching a restitution decision at sentencing.

355. Harland's thesis is that the use of restitution is grounded more on convenience and practicality than on any particularly "profound reconsideration of the fundamental purposes of civil versus criminal courts or tort-crime differences." *Id.* at 120.

356. *See* CAL. GOV'T CODE §§ 13959–13974 (West 1980 & Supp. 1985).

357. *See, e.g.*, ALASKA STAT. § 18.67.010–.180 (1981 & Supp. 1984); FLA. STAT. ANN. § 960.01–.28 (West 1985); MASS. ANN. LAWS ch. 258A, §§ 1–9 (Michie/Law. Coop. 1980 & Supp. 1985). In 1981, Congress established a federal victim compensation program. Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (1984). The federal law enacts a tax on offenders—$25 for individuals convicted of a misdemeanor, $50 for individuals convicted of a felony—similar to the "penalty assessment" scheme used in California. *Id.* at § 1405, 98 Stat. at 2174–75. The funds are to be distributed to state victim's compensation programs.

358. *See, e.g.*, Yarborough, *A 21st of the Eighty-Ninth Congress—The Criminal Injuries Compensation Act*, 50 MINN. L. REV. 255, 256–57 (1965). English penal reformer Margaret Fry argued, for example, that the state, having taken on the responsibility of controlling crime and adjudicating guilt, also had the responsibility to compensate those injured when the state failed to control crime. *See* Fry, *supra* note 36; *cf.* Mueller, *Compensation for Victims of Crime: Thought Before Action*, 50 MINN. L. REV. 213, 216–17 (1965) (characterizing victim's compensation as "compulsory government insurance, comparable to workmen's compensation, social security, or medicare"); Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 249 (1965) (emphasizing the need for the state to fulfill "an important social welfare function" through victim's compensation). *But see* R. ELIAS, *supra* note 72, at 27–29 (victim's compensation is motivated by the desire to "buy off" civil unrest). Weeks, *The New Zealand Criminal Injuries Compensation Scheme*, 43 S. CAL. L. REV. 107, 107–09 (1970) (victim's compensation was a politically convenient way to offset objections to liberalization of penal system).

Although inspired by liberalism, several statutes did incorporate conservative values, such as requirements that the victim be "blameless" and cooperate with law enforcement officials. *See, e.g.*, CAL. GOV'T CODE § 13961 (West Supp. 1985) (State Board of Control empowered to promulgate eligibility rules); CAL. ADMIN. CODE tit. 2, Rr 618.3, 619.9 (1985) (for claims arising before July 1, 1974, victims could be required to cooperate with law enforcement in the apprehension *and* conviction of the criminal in order to recover; for claims arising July 1, 1974 or thereafter, applicant has burden of proving by a preponderance of the evidence to Board's "satisfaction" that injuries or death arose "from a crime of violence which was promptly reported" to law enforcement agency, and that victim did not, "by his acts, contribute to his own injuries," among other things); MINN. STAT. ANN. § 611A.53(2) (West Supp. 1985) (reparation unavailable

1. *A final note on victim's compensation programs*

The California compromise led to increased funding for the already existing victim's compensation program.[356] Victim's compensation statutes exist in almost every state[357] and are largely the product of a liberal, social welfare ideology,[358]

although some have argued that compensation should be considered a right.[359] Still, no satisfactory explanation exists for treating victims of crime as *more* entitled to state-funded compensation than victims of other insolvent or governmental tortfeasors. Several compensation advocates have argued that because the state has taken responsibility for crime prevention, it has a duty to compensate individual victims when it fails to protect them.[360] This argument, however, does not explain why crime victims are "special." Under this analysis, the state is equally under a duty to compensate victims of uninsured motorists because it controls the licensing of drivers and "requires" insurance.[361] Moreover, according victims of crimes a special status in society above victims of governmentally inflicted harms—for example, civilians who are injured because of the dumping of toxic wastes by the government, or who get cancer as a result of government testing of nuclear weapons—seems to be insupportable.[362]

An argument that the state needs a victim's assistance to enforce the criminal law, and therefore should reward victims for their cooperation, is problematic under most existing statutes. Many victim's compensation programs provide only for victims

---

d victim failed to report the crime to the police within five days, "failed or refused to cooperate fully" with law enforcement, or is related to the offender); WIS. STAT. ANN. § 949.08 (West 1982) (compensation unavailable if victim "engaged in conduct which substantially contributed to" injury or death, "has not cooperated with law enforcement," is related to the offender, or committed a crime himself or herself).

359. R. ELIAS, *supra* note 72, at 237, 252–58 (social welfare model may increase victim discontent); Elias, *The Symbolic Politics of Victims Compensation*, 8 VICTIMOLOGY 213, 217–20 (1983) (compensation should be based on a theory of rights).

360. *See, e.g.*, ELIS, *supra* note 36; Wolfgang, *Social Responsibility for Violent Behavior*, 43 S. CAL. L. REV. 5, 6 (1970); Nathorough, *supra* note 358, at 256.

361. *See generally* Stapleton, *A Modest Proposal to Insure Justice for Victims of Crime*, 50 MINN. L. REV. 285 (1965) (criticizing special treatment of crime victims inherent in state compensation schemes and advocating private insurance as a remedy). I am unaware of any proposals in which states compensate victims of uninsured motorists, the farthest that states seem willing to go in this direction is to require that drivers be insured. *See, e.g.*, CAL. VEH. CODE §§ 16020, 16021 (West Supp. 1985); FLA. STAT. ANN. §§ 324.011–.021, 627.733 (1981 & Supp. 1985). The sanctions imposed on uninsured drivers who are involved in accidents, *see* CAL. VEH. CODE § 16070 (West Supp. 1985); FLA. STAT. ANN. § 324.051(2) (West Supp. 1985), typically suspension or revocation of a driver's license or vehicle registration, do nothing to compensate victims.

362. For an excellent attempt to find a theoretical and practical justification for government compensation to victims of toxic waste dumping, see Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983).

of violent crimes,[363] and frequently require that the victims "innocent"—excluding those who arguably precipitated the crime or are otherwise "blameworthy,"[364] or those who do not cooperate fully with law enforcement.[365] This substantially narrows the field of victims encouraged to aid the system and provides few incentives to aid law enforcement. Further, with normative language such as "innocence" in the statutes, those in charge of deciding which victims receive compensation have enormous discretion. Finally, one of the major complaints about victim's compensation programs has been that few victims know or are told of such programs.[366] As a practical matter, compensation falls woefully short as an incentive for many victims to help the state enforce laws.

Another less instrumental approach to victim's compensation programs might justify treating crime victims differently from other victims. The state has an expectation that crime victims will report crimes and assist in the prosecution of offenders, but this expectation does not extend to victims of many kinds of insolvent tortfeasors. Indeed, the state may *punish* a crime victim for noncooperation by holding him or her in contempt for refusing to testify, or the state conceivably could prosecute victims for the obstruction of justice.[367] Although crime victims can and do choose not to report crimes, once they report a crime, they must accept the intrusion of the larger community into their experience. Victim's compensation may provide a symbolic recognition of the victim's contribution to the general welfare of the community. Perhaps by demonstrating our collective opposition to violent crime by compensating victims, the system gains moral

---

363. *See, e.g.*, ELIS. STAT. ANN. § 960.03(3),(7) (West 1985); OKLA. STAT. ANN. tit. 21 § 142.3(3) (West 1983); WIS. STAT. ANN. §§ 949.01, .08 (West 1982 & Supp. 1985).

364. *See* note 358 *supra*.

365. *See, e.g.*, CAL. ADMIN. CODE tit. 2, R. 618.3 (1985); MINN. STAT. ANN. § 611A.52(2)(b) (West Supp. 1985); OHIO REV. CODE ANN. § 2743.60(C) (Page Supp. 1984); OKLA. STAT. ANN. tit. 21 § 142.10(3) (West 1983); WIS. STAT. ANN. § 949.08(3) (West 1982); W. VA. CODE § 14-2A-14(b) (Supp. 1985).

366. *See* R. ELIAS, *supra* note 72, at 111–12, 180. Elias *supra* note 359, at 218.

367. In 1982 the Santa Clara County courts held two minor victims in contempt for their refusal to testify in sexual abuse cases. Both victims were confined in juvenile hall. Despite the negative publicity, the District Attorney's office supported the imprisonment of the victims. *See* Letter from William Hoffman, Chief Assistant District Attorney for Santa Clara County, to Lynne Henderson (May 25, 1982) (on file with author); *see also* Nakao, *12 Year Old Girl Held in Solitary for Not Testifying Is Freed*, San Francisco Examiner, Jan. 8, 1983, at 1, col. 1 (molestation victim held in contempt for refusing to testify against stepfather).

credibility for its position against noninstrumental violence. But, to compensate such victims lacks coherence, and to characterize victim's compensation as symbolic of an opposition to noninstrumental crimes is to accept responsibility to contribute to the fund generally, rather than to tax offenders in order to compensate. The unwillingness of most advocates of compensation to abandon the premise that the wrongdoer should directly or indirectly pay the victim weakens the interpretation of victim's compensation as a community response.[368]

A final observation on restitution and compensation is appropriate before concluding. Neither compensation nor restitution provide for nonmonetary loss. The secondary costs of victimization—pain and suffering, emotional distress, loss of status and security—are not easily quantified. And, except perhaps for loss of status, these "costs" are not ultimately expunged by money, although as the common wisdom would have it, money certainly helps. But increased understanding of the meaning of the experience and willingness to overcome the ambivalence about victims might be of more value to them in the long run, particularly because of the reality of limited monetary resources.

VI. Conclusion

This article has briefly touched upon the complex issues raised by the victim's rights movement and the psychological phenomena resulting from victimization. It offers an outline of the current state of the law and does not discuss victim's rights proposals that do not relate directly to changes in the criminal law or process.[369] Rather, the concern of this article is to increase the understanding of the experience of victimization, and the manner in which the anguish of victims has been reformulated or mistranslated into support for a particular ideology. The cooptation of victim's concerns by crime control proponents has created a new mythology of victimization that fails to hear those concerns. The following exchange, taken from the Senate Subcommittee Hearings on the Omnibus Victim and Witness Protection Act, both exemplifies the inability of nonvictims to hear past victims and demonstrates the resulting translation of the anguish of victimization into a condemnation of the offender:

> *Senator Heinz*: Do you have any thoughts on how prosecutors can be more sympathetic or more understanding, more humane in their treatment of people such as yourself?
>
> *Mrs. X*: I certainly do have a lot of opinions. When I talked to the police—I did a series of workshops in the Montgomery County Police Department—the first thing I emphasized was that whether a person is a prosecuting attorney, a judge, or the President of the United States, I would urge him to examine his own feelings about crime. In my particular case, about rape.
>
> What I feel is that most people are so afraid of being victims themselves that when they are dealing with a victim they treat us as anathema. *Our very existence* makes them uncomfortable. I imagine I look like someone you know. Maybe I look like someone you love? I might make you feel uncomfortable just by my existence. Rape happened to me. It wasn't nice. It wasn't midnight, and I wasn't alone or in a bar. I didn't ask for it.
>
> This makes people uncomfortable. I would ask prosecuting attorneys not to hide behind sarcasm here, nor employ the games of the law, not to be afraid of being somehow compassionate, not to confuse cold with professional.
>
> *Senator Heinz*: In other words, what you are really saying is that although the *criminal* may have every step of the way explained to him by his lawyer or, if he can't afford his own lawyer, by a court-appointed lawyer—paid for by the *taxpayer*, there was no one in your case who ever had the courtesy or the simple decency to explain the process and sit down with you and let you know, no matter how uncertain the process was, what it was comprised of.[370]

To whom, or to what, is he responding?

[368] See notes 147-147 *supra* and accompanying text.

[369] For an article that discusses changes in the law of evidence as a result of the California Victim's Bill of Rights, see Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. Rev. 1003 (1984).

[370] *Senate Hearings*, *supra* note 274, at 65-66 (emphasis added).

Mr. HYDE. I thank the gentlelady. We have a vote on. Voting on a rule. So we will go vote and resume this so we don't stretch you out over the lunch hour too long. We'll come back as soon as the vote is over.

I request, I plead with my colleagues to come back so we can dispose of this panel. Thank you.

[Recess.]

Mr. HYDE. The committee will come to order. I'm glad you're here, Mr. Reed. You enable us to proceed. You have great utility.

Ms. Greenlee, you are recognized.

STATEMENT OF ELLEN GREENLEE, PRESIDENT, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Ms. GREENLEE. Thank you, Mr. Chairman. It is my pleasure to appear today before the Judiciary Committee in my role as president of the National Legal Aide and Defender Association, which is a national nonprofit membership organization dedicated to ensuring competent legal representation to indigent people in our civil and criminal justice system.

We are committed to working to preserve an American justice system that works fairly and effectively for all citizens regardless of wealth, status or race. We are greatly concerned about proposals for a victims' rights constitutional amendment which threatens to bring the American justice system to its knees.

I thank the committee members and Chairman Hyde for holding these hearings and taking this discussion into the practical realm, since our Presidential candidates are too busy to focus sharply on the impacts such offhand proposals from the campaign trail can have. I hope you will take the time to examine the issues closely, to look at less dramatic, more realistic, nonconstitutional vehicles such as statute or Executive order, to accomplish the sought after protection of victims' rights we all support.

I know you intend to seek input from experts in the criminal justice system and interested members of the public in order to determine the costs and impact of a constitutional amendment. Passing an amendment with the bandwagon rolling as it obviously is from my observation today, is much much easier than undoing it as we saw with the hasty, ill-advised passage of the 18th amendment for national prohibition some years back.

I ask you not to confuse NLADA's opposition to this proposed amendment with opposition to victims' rights and even reasonable expansion of such rights. NLADA speaks for poor people, many of whom are victims, whether they are the injured or the accused. Rather, we believe that the proposed reforms giving victims greater access to and involvement in the criminal justice processes, can be achieved more simply through carefully crafted legislation. At a minimum, we suggest that nonconstitutional approaches must be tried and found wanting before a Federal constitutional amendment is locked in forever.

The proposal before you would guarantee to victims the right to be informed of and present at any stage in the criminal process at which the defendant would appear, the right to object to a negotiated plea or a release from custody, the right to speedy trial and a final conclusion free from unreasonable delay, full restitution

from the offender, police protection against violence or intimidation by the accused or convicted offender. We feel there is necessarily implicit in giving such rights, the additional right to sue the Government to enforce these rights.

What will this mean to those institutions that are part of the criminal justice system? How will police feel about giving victims a constitutional right to protection, which no one else in this country presently enjoys. If such protection from harm fails, will the victim then sue the police? Won't this detract seriously from the efforts of the police to fight crime?

I can see prosecutors' offices tied in knots. At present, they resolve about 90 percent of their cases by agreement, an especially necessary way of managing overwhelming caseloads in large urban areas such as Philadelphia. By giving victims a constitutional right to in effect veto a plea agreement, a case that could be resolved in an hour will turn into a jury trial that could last a week or two.

In my role as chief defender of the Defender Association of Philadelphia, I work in a system which has a State statutory response to providing rights to victims, including notice of hearings, the right to be heard at sentencing or at the proposed release of the defendant from custody, and the right to compensation for injury, among other rights. This legislation appears to me to work well to protect victims' rights and is financed by fines and costs paid by those convicted of crimes, not tax dollars.

The system in Philadelphia would collapse of its own weight if victims enjoyed a constitutional right to veto a negotiated guilty plea. We are as underfunded as any indigent defense system and funded at less than the district attorney's office. We would, at the Philadelphia Defender alone, face the possibility of at least an additional 10,000 trials per year after aborted plea negotiations for which we would clearly need additional staff and millions of dollars to handle. Of course the judicial system would also be overwhelmed with cases.

The most important impact probably would be in the corrections area, where there are currently 5 million people under correctional control, 1½ million of whom are incarcerated. This constitutional amendment would require correctional authorities to start identifying, tracking down, and notifying victims of crimes which may be decades old, every time any proceeding involving an offender occurs, from setting a release date to deciding whether to revoke an inmate's television privileges, or place an electronic monitoring bracelet on a parolee's ankle.

By consuming the time and resources of society's crime fighting institutions, including police, prosecutors, courts and probation, the public will be made less safe, and the amount of taxpayer dollars spent would be staggering. Why not try the nonconstitutional fixes before amending the Constitution, and see if they work? For example, order all Federal prosecutors, law enforcement agents, corrections and parole officials to notify and consult victims at appropriate stages, with severe disciplinary sanctions for failure to do so. Every State could do the same.

A carefully balanced mandatory restitution statute has already been enacted at the Federal level. One could do the same at the

State level, taking into consideration that 85 percent of those convicted of crimes are indigent.

Despite all the serious practical problems with the proposed amendment, the debate has not yet progressed beyond platitudes of concern for crime victims. No impact analysis has been conducted by any of the criminal justice system components which would be effected. Despite legislation on the books mandating cost assessment of pending crime bills, absolutely no cost inquiry has been conducted.

We are due to order such a study immediately, not after the ratification process has begun. Mustering the necessary super majorities in Congress and among State legislatures to ratify this amendment appears to me to be quite feasible. Mustering the same margins to vote later to remove protections from victims from the Constitution when the amendment turns out to have been ill-conceived is utterly out of the question.

I hope you will seriously consider what we have to offer. I thank you for the opportunity to appear here today on behalf of the National Legal Aide and Defender Association.

[The prepared statement of Ms. Greenlee follows:]

PREPARED STATEMENT OF ELLEN GREENLEE, PRESIDENT, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

I am pleased to appear before you today to present the views of the National Legal Aid and Defender Association regarding proposals to amend the United States Constitution to guarantee a variety of new rights for victims of crime. NLADA is a national non-profit membership organization dedicated to ensuring competent legal representation to indigent people in our civil and criminal justice systems. Above all, we are dedicated to preserving an American justice system that works, fairly and effectively, for all individuals regardless of wealth, status or race.

We are deeply concerned that the proposals for a victims rights constitutional amendment threaten to bring the American criminal justice system—in all its incarnations, federal, state, local, tribal, military, juvenile—to its knees. We are concerned that the popular and political momentum for the amendment is far out pacing the inquiry into and understanding of the amendment's practical ramifications. Everybody wants fairness for victims, and this amendment is the fiercest embodiment of that sentiment. But absolutely nobody has yet analyzed the precise impact of the amendment on the fair and effective functioning of our criminal justice system.

I am here to plead with you to conduct this inquiry now, before Congress approves the amendment, realizing that passing this amendment is a thousand times easier than undoing it. NLADA has been studying this amendment for some time, and has identified a variety of potential problems for all the major players in the criminal justice system, as well as the American public itself. An article by our Special Counsel, Scott Wallace, outlining these concerns appeared in the Washington Post two weeks ago, and is attached to my testimony for your consideration. But we at NLADA do not have the resources or the ability to catalogue the amendment's exact cost, either in terms of dollars, personnel, or the system's basic ability to process criminal cases and protect the public. This we hope Congress will do, with expert input from police, prosecutors, courts, corrections, indigent defense, and hopefully, an objective second look from the victims groups themselves.

Though we oppose this amendment, because we believe it will lay waste to the criminal justice system which we all serve, we do not say that we oppose any of its goals. Rather, we suggest that all of its reforms, giving victims greater access to and involvement in criminal justice processes, can be achieved more directly, and with far less unintended ancillary mischief, through ordinary legislation or executive orders. At the very least, we suggest that the nonconstitutional approaches must be tried, and found wanting, before a federal constitutional amendment is locked in for all time.

Among the rights which would be guaranteed to victims in every criminal case in every federal, state and local jurisdiction under H.J. Res. 174, the companion measure to the leading Senate measure, are the following: the right to be informed

of and be present at any stage of the criminal process at which the defendant may be present; the right to object to a negotiated plea or a release from custody; the right to a speedy trial and a final conclusion free from unreasonable delay; full restitution from the offender; police protection against violence or intimidation by the accused or convicted offender; and—necessarily implicit since there can be no rights without remedies—the right to sue the government to enforce these rights.

How will police feel about giving victims a constitutional right to protection from further violence by their accused attacker? Currently nobody in the nation has a constitutional right to police protection, and for good reason. The main remedy for governmental violation of such a constitutional right would be a 1983 civil action for money damages. Suing the police when a crime is committed seems an oddly misdirected way to fight crime, and an expensive one to boot, given the size of possible damages awards for egregious injuries.

Prosecutors' offices will be tied in knots. They currently resolve nine out of ten criminal cases by plea agreement. It is an indispensable way of managing the overwhelming crush of cases, and of inducing cooperation by low-level offenders against their higher-ups. Letting a victim block a plea agreement turns a case that would take a few days into a trial that could take a few months. Yet a victim's understandable focus on just their own case could confound prosecutors' ability to simultaneously juggle the thousands of other cases that they are expected to bring to a satisfactory disposition. Also, vast numbers of government lawyers will have to be diverted to defend the lawsuits brought by victims who feel that one or another of their new constitutional rights have not been adequately attended to; and what happens when a victim wants a "speedy" trial before the prosecutor is ready to proceed?

Corrections officials won't know what hit them. There are currently about five million people under correctional control, 1.5 million of whom are incarcerated. The day this constitutional amendment takes effect, corrections authorities will have to start identifying, tracking down and notifying victims of crimes which may be decades old, every time any proceeding involving an offender occurs, from setting a release date to litigating a habeas corpus petition to deciding whether to revoke an inmate's television privileges or place an electronic monitoring bracelet on a parolee's ankle. It flies in the face of a key practical underpinning of criminal statutes of limitations: the logistical difficulty of tracking down witnesses, including victims, many years after a crime was committed.

We have heard some sobering specifics from Texas corrections officials. That one state holds over 500,000 disciplinary hearings per year involving inmates, covering punishment for something bad the inmate has done, or good time credits for good behavior. This does not include hearings involving offenders outside the prison system—that is, on probation or parole—and does not include a second large category of prison hearings, those at which a prisoner's security classification is to be upgraded or downgraded. Texas officials are trying to estimate the cost not only of printing and mailing a half million notices every year, but also creating a massive new computer database, cross referencing offenders with victims, maintaining and updating victim addresses with enough diligence to avoid being sued, and being able to automatically generate a notice whenever a hearing is scheduled. A special problem they identify is when a disciplinary hearing is the result of fighting between inmates; state law requires the special segregation of the inmates pending the hearing, which adds special burdens on prison space and costs. They anticipate that the period of this special segregation will have to be increased from the current 48 hours to at least two weeks, to allow time for the notice to reach the victim and a reasonable opportunity for the victim to respond and make arrangements to attend. As far as I know, they don't have actual cost figures yet on any of this, or a position on the amendment, but clearly they, and this Committee, would greatly benefit from a thorough inquiry into this type of unintended complication.

The judicial system will be particularly crippled. Blocked plea agreements will mean a massive increase in the current 10 percent of criminal cases which require a full-blown and time consuming trial. Courts all over the country are completely overwhelmed by their current caseloads. Remarkably, by granting a right to a "final conclusion free from unreasonable delay" in addition to a "speedy trial," the amendment could open up the possibility of victims suing judges for not wrapping up a case fast enough—notwithstanding traditional protections of judicial immunity. This provision would also trump the exhaustive new habeas corpus statute that Congress spent three decades debating, reintroducing worlds of ambiguity about whether any delay in correcting a wrongful conviction could possibly be "unreasonable."

And the burdens imposed on the courts by giving victims a constitutional right to full restitution would be not only massive, but pointless. Over 85 percent of all criminal defendants are indigent, with no possibility of ever paying restitution, and restitution is already commonly imposed on the rest. Mandating court proceedings

to calculate a victim's damages even where the defendant is penniless would be the equivalent of adding hundreds of thousands of civil trials to court dockets all across the land.

Another consequence of mandating full restitution in all criminal cases: Forcing the nation's probation officers to endlessly pursue uncollectible debts will take them away from their main job of supervising defendants and ex-inmates. As the Judicial Conference of the United States warned in opposing blanket mandatory restitution in Senate hearings last November, there would be "a reduced ability of the probation officer to intervene at early signs of trouble, such as a first use of drugs, [leading to] greater rates of recidivism and more crime, not less. . . . No matter how noble the cause," Judge Mary Anne Trump Barry testified on behalf of the Judicial Conference, "there is clearly no sense in wasting taxpayer dollars in futile gestures, or, worse yet, squandering precious resources and ultimately *weakening* our war on crime." Responding to such concerns, Congress added alternative sanctions for indigents to the mandatory restitution statute enacted in the terrorism legislation just two months ago, which would be overruled by the proposed constitutional amendment.

Indigent defense systems will also find their workloads massively increased by the reductions in pleas and the increase in trials. But the funding crisis and staffing shortages will be far more severe for indigent defense providers than for the politically popular branches of the criminal justice system. Annual funding increases for prosecution and courts nationwide are about six times what indigent defense gets for drug cases alone, according to the 1996 National Drug Control Strategy, and the growing gap leaves public defenders increasingly unable to provide the basic legal representation that the Constitution requires. Exacerbating this will be demands under the new amendment for lawyers to represent indigent victims to vindicate their new rights in the criminal system. In a related vein, mandatory full restitution regardless of an offenders inability to pay will force the incarceration of indigents under circumstances where non-indigent offenders could simply buy their freedom—an economic discrimination and hitherto unconstitutional result.

By consuming the time and resources of society's crime-fighting institutions, including prosecutors, police, courts and probation officers, the public is made less safe. And the amount of taxpayer dollars spent could be staggering. Consider the cost of identifying, locating and notifying every victim every time a defendant is involved in any proceeding—including arrest, booking, police questioning, line-up, initial appearance, preliminary hearing, trial, sentencing, appeal, post-conviction, habeas corpus, all the way down to routine prison administrative proceedings regarding discipline or privileges such as work release, family visitation or outdoor exercise—and then arranging to schedule that proceeding to fit the victim's availability. Consider the complexity of trying to figure out just who qualifies as a victim of drug dealing, or a racketeering conspiracy, or a toxic discharge into a river by a corporation. Add the cost of the extra trials and longer prison sentences when victims oppose plea agreements or release dates. Add the cost of more government lawyers and probation officers. Add the cost of processing the lawsuits by victims whose rights have been neglected, and the damages ordered to be paid out of public coffers.

All these costs would be multiplied many fold under the other House version, H.J. Res. 172, which would cover not just violent crime, but the far greater number of non-violent felonies as well. After all, senior citizens defrauded of their life savings ought to be afforded at least as much protection as a gang member beaten up by a drug dealer.

Victims themselves may wonder whether all these costs bring much benefit to them. In fact, the changes will damage the best assistance program victims currently have: the compensation funds around the country that provide quick monetary help, counseling and support services to victims in the traumatic aftermath of a violent crime. These funds consist of fines paid by offenders to the government. Giving restitution constitutional status will give it priority over payment of fines in the list of the offender's obligations—an express goal declared by the amendment's primary drafter, corporate lawyer Steve Twist, in testimony in April before the Senate Judiciary Committee. Because offenders rarely have the resources to fully pay both restitution and fines, the Director of the National Victim Center warned the Senate in last November's hearings on mandatory restitution, "we have grave concerns over the possibility that full mandatory restitution in all criminal cases may benefit individual victims in a single case at the expense of the thousands of victims who are served by [these] victim assistance programs."

In fact, the only clear winners under the proposed constitutional amendment would be trial lawyers. When they convince a victim to sue police, prosecutors and other government agencies for failure to give victims the attention to which they are constitutionally entitled, they will pocket one third of every judgment. Some may

concentrate on the big money, such as failure-of-police-protection in cases where recidivism is common and injuries often severe, like spousal assaults. Others interested in a steady income from smaller actions could concentrate on failure-to-notify or speedy-trial or lack-of-opportunity-to-object-to-pleas-or-releases cases. The victims bar would have lucrative new opportunities, entirely at taxpayer expense.

Associate Attorney General Schmidt has explained the administrations position that any amendment should prohibit civil actions for damages against government officials arising out of the amendment's new rights. But the Supreme Court frowns on rights without remedies. That's why it created *Bivens* actions for damages directly under the Constitution. Purporting to close the door on damages actions will simply force the Court to open another. What other remedy will suffice when, for example, a woman who has been beaten repeatedly by her husband is beaten again, or killed, in obvious violation of her constitutional right to notice or police protection? How about where a murder of a family's sole wage-earner is directly attributable to a failure to give the constitutionally mandated notice of a release or escape? Injunctions or mandamus are useless. Disciplinary action against the responsible official is completely inadequate as punishment for, in essence, negligent or reckless homicide. A tort or criminal action against the offender is already available without amending the Constitution, and in any event would be irrelevant, since it is the government, not the offender, who has violated the victim's constitutional rights. Only a civil action for damages against those who violated the victim's fundamental constitutional rights can begin to vindicate the rights and compensate for the injury.

Let me address some of the other arguments the administration has made in its June 25 endorsement of the amendment:

The President said that while working to amend the Constitution, he wanted to take executive and statutory action to protect victims rights. Why not try the non-constitutional fixes *before* amending the Constitution, and see if they work? For example, order all federal prosecutors, law enforcement agents, corrections and parole officials, to notify and consult victims at appropriate stages, with severe disciplinary sanctions for failure to do so. Every state could do the same. Work for a statute requiring that victims who wish to attend the trial be permitted to testify first, including allowing videotaping for use later in the trial if necessary to safeguard defendants' rights. As Associate White House Counsel David Fe in noted at the press briefing, the ability to do this without a constitutional amendment is already established: current law allows FBI case agents to stay in the courtroom throughout the trial even if they are going to be called as a witness. A carefully balanced mandatory restitution statute (i.e., with allowances made for the 85 percent of offenders who are have no money to pay restitution) has already been enacted at the federal level; do the same at the state level.

The President and Mr. Schmidt proposed that the amendment should never help criminals who become victims, or let them slow down the criminal justice process, or result in the reversal of a criminal conviction. It is indeed common for people who have broken the law to become victims themselves (e.g., in gang conflicts), and there is great appeal to drawing some line between "innocent" victims and "guilty" ones. But wherever that line is drawn, significant problems will be created. If the class of unprotected, guilty victims is narrowly drawn—e.g., guilt must be in the form of a criminal conviction for conduct related to the offense of victimization—the door is open for all types of unconvicted bad characters to claim victim status for the sole purpose of wasting government officials' time, slowing down the process, or seeking to provoke a mistrial by intruding too far on the defendant's rights. If the class is widely drawn—e.g., any criminal record, including arrests or old juvenile offenses—many deserving victims may be excluded based on a previous, relatively insignificant bad act having no bearing on the present crime. Either way, or if the class is left undefined, an incentive is created for the government officials who will be defendants in legal actions by victims, to avoid liability by placing a victim-plaintiff into the "guilty" class. That is, whenever there is any potentially unsavory aspect of the victim's past, the government has a reason to put the victim herself on trial. And even before the litigation stage, someone in every prosecutor's office, police station, prison, court or parole board will need to be responsible for sorting out which victims are too "guilty" to require notification, consultation, protection or restitution. Denying constitutional protections based on some degree of badness is a minefield, and completely unworkable.

The President proposed that the amendment should be self-executing, requiring no additional legislation. This is impossible. There are too many questions and ambiguities presented by the subject matter. For example, just who qualifies as a victim? In a murder, what survivors should have to be notified: close relatives, not-so-close relatives, gay partners, business partners? In a toxic discharge, is everybody

downstream or downwind a victim? In obscenity, drug dealing, treason, or election fraud, isn't the entire public victimized? What form of notice is adequate? How far in advance of a proceeding? What to do about full restitution if the defendant is indigent? What are the limits of "reasonable" police protection: police budget limits, the victims' own physical ability to protect themselves, or the degree of likelihood of injury, and if so, exactly how much likelihood is necessary? To proceed without implementing legislation would condemn the courts, victims, and the rest of the criminal justice system to decades of uncertainty and litigation.

Mr. Schmidt said that the goal is not to have victims' rights defeat defendants' rights, but just to require "a balancing effort which is not required under current law." It may not be required, but it is certainly possible without a constitutional amendment. There is nothing in the Constitution currently which prevents this same balancing effort to be mandated by statute. Thirty states currently do this, and apparently find the results sufficiently protective of victims to vitiate the need for a constitutional amendment.

White House press secretary McCurry said that the costs of the amendment could be absorbed within the criminal justice system without undue burden on taxpayers. He added, however, that the administration had no actual cost figures but would "try to check." We believe this is the administration's soundest proposal.

Despite all the serious potential practical problems, the debate has not yet progressed beyond platitudes of concern for crime victims. No impact analysis has been conducted by any of the criminal justice system components which would be affected, including police, prosecutors, courts, corrections, probation officers and public defenders. And despite legislation on the books mandating costs assessments of pending crime bills (18 U.S.C. 4047) and unfunded mandates forced by Congress upon the states (the Unfunded Mandates Act of 1995, P.L. 104–4), absolutely no cost inquiry has been conducted.

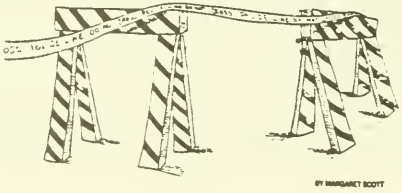
We note that the experience in the 19 states which have adopted their own state constitutional amendments on victims rights is of limited usefulness as a guide. Primarily because states have no equivalent of 1983 civil actions, or Bivens actions, to recover damages when a constitutional right is violated by government action, the state constitutional provisions so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors and courts. A state constitution is far easier to amend. and easier to ignore, than the federal one.

Most importantly, study is needed immediately, not after the ratification process has begun. Mustering the necessary super majorities in Congress and among the state legislatures to ratify this amendment appears today to be quite feasible. Mustering the same margins to vote later to *remove* protections for victims from the Constitution, in the event that the amendment actually turns out to have been a terrible idea, is utterly out of the question.

I appreciate this opportunity to participate in this momentous debate on behalf of NLADA. I would be happy to entertain any questions the Committee may have.

ATTACHMENT

THE WASHINGTON POST DATE 6-28-96 PAGE A21



BY MARGARET SCOTT

Scott Wallace

Mangling the Constitution

The folly of the victims' rights amendment.

Bob Dole has proposed a constitutional amendment creating new rights for crime victims, because, as he says without elaboration, "the president must be on the side of the victims." Just this week, President Clinton endorsed the idea, too. Criminal defendants have plenty of rights, goes the reasoning, so why shouldn't victims?

Such an amendment may seem politically irresistible, but in fact there is something in it for just about everybody to object to, including victims.

Under the leading Senate measure, victims in every federal, state and local jurisdiction would have the right to be informed of and be present at any stage of the criminal process at which the defendant might be present. They would be entitled to object to a negotiated plea or a release from custody. They would be guaranteed a speedy trial and a conclusion free from unreasonable delay; full restitution from the offender; police protection against violence or intimidation by the accused or convicted offender, and—unspoken but essential—some way of enforcing those rights.

In practice, though, how would police feel about giving victims a constitutional right to protection from further violence by their accused attacker? Nobody in the nation now has a constitutional right to police protection, and for good reason: lawsuits. People unhappy with police protection would sue to get more of it. People injured because there wasn't enough of it would sue for money damages.

Prosecutors' offices would be tied in knots. They currently resolve nine out of 10 cases by plea agreement. Letting a victim block a plea agreement means a lengthy trial, and it takes away a prosecutor's best tool for inducing cooperation against more serious criminals. Forcing a case to a "speedy" trial before the prosecution is ready helps nobody but the defendant.

Corrections officials wouldn't know what hit them. About 5 million people are under correctional control, 1.5 million of whom are incarcerated. The day this constitutional amendment took effect, corrections authorities would have to start identifying, tracking down and notifying victims of crimes that might be decades old every time any proceeding involving an offender occured, from setting a release date to deciding whether to revoke an inmate's television privileges or place an electronic monitoring bracelet on a parolee's ankle.

The courts particularly would be crippled, and not just by being forced to provide more trials faster. By granting a right to a "final conclusion free from unreasonable delay" in addition to a "speedy trial," the amendment could open up the possibility of a victim's suing a judge for not wrapping up a case fast enough. It would also trump the exhaustive habeas corpus statute that Congress finally has passed to speed up the review of criminal convictions, reopening worlds of ambiguity about whether any delay incurred in correcting a wrongful conviction could possibly be "unreasonable."

And the burdens imposed on the courts by giving victims a constitutional right to full restitution would be not only massive but pointless. More than 85 percent of all criminal defendants are indigent, with no ability to pay restitution. Yet courts still would be required to hold hundreds of thousands of hearings to determine who was harmed and exactly how much, and to issue a precise, fair, but completely useless order.

Moreover, forcing the nation's probation officers to endlessly pursue uncollectible debts would take them away from their main job of supervising defendants and ex-inmates.

Perhaps the biggest losers, though, would be ordinary Americans. Given the drain on the time and resources of society's crime-fighting institutions, including prosecutors, police, courts and probation officers, the public actually would be less safe with such an amendment in force. And the amount of taxpayer dollars spent could be staggering.

Consider the cost of identifying, locating and notifying every victim at the hundreds of routine stages of the criminal justice system where the defendant is entitled to be present—and then arranging to schedule the proceeding to fit the victim's availability. Consider the complexity of trying to figure out just who qualifies as a victim of crimes such as drug dealing, racketeering conspiracy or a toxic discharge into a river by a corporation. Add the cost of the extra trials and longer prison sentences when victims oppose plea agreements or release dates. Add to this the cost of more government lawyers and probation officers, adjudicating the complaints of victims' whose rights have been neglected, and the damages ordered to be paid out of public coffers.

Oddly enough, the amendment would undermine the best assistance program victims already have: the compensation funds around the country that provide quick monetary help, counseling and support services in the traumatic aftermath of a violent crime. The criminal fines that fund these programs would dry up if the Constitution requires restitution to be fully paid first.

In fact, the only likely winners under the proposed constitutional amendment would be trial lawyers. When they persuade a victim to sue police, prosecutors and other government agencies for failure to give victims the attention to which they are constitutionally entitled, they will pocket one-third of every judgment. Rights without remedies are meaningless, and money damages are the only possible remedy when people have been seriously injured because the government violated their constitutional rights. Damages could be enormous for severe injuries directly traceable to a failure of required police protection, a failure to notify about a release or escape, or a lack of opportunity to object to a plea or a release.

But despite these fairly obvious, and disastrous, practical ramifications, the debate has not yet progressed beyond platitudes of concern for crime victims. And despite legislation on the books mandating cost assessments of pending crime bills and of unfunded mandates Congress forces upon the states, absolutely no cost inquiry has been conducted.

In this fact-free campaign environment, such a politically appealing sop to victims could pass Congress in a heartbeat. Congress should take a deep breath, count to Nov. 5, and then decide dispassionately whether the measure merits more careful examination.

The writer is special counsel with the National Legal Aid and Defender Association.

Mr. HYDE. Thank you very much, Ms. Greenlee. Mr. Berman, you have been well behaved today, so you get to ask questions.

Mr. BERMAN. Today is a limiting phrase or a descriptive one? [Laughter.]

Mr. HYDE. I don't want to push the envelope, as you say.

Mr. BERMAN. Thank you, Mr. Chairman. I have a few questions. First to Ms. Semel, you talked about one of the concerns about this proposal is that it turns the accused into the convicted. But why in the context of victims' participation in a plea bargain, in stating objections to a potential plea bargain where the accused is now in the process of pleading guilty to something? I could see perhaps at a bail hearing, although I take it the state of the law has changed somewhat in the last several decades, and the notion of the likelihood of appearing is no longer the sole or critical criterion for determining bail levels or release on bail. But why at a plea bargain process would you be turning the accused into the defendant?

Ms. SEMEL. I think first of all, I was speaking somewhat globally with regard to the pretrial and the trial processes. I do want to remark that you know, in about 1991 at the Bicentennial of the Bill of Rights, after California had had a victims' rights amendment for some 10 years, the State Bar commissioned a study to assess attitudes toward the criminal justice system and found that at least 42 percent of those who responded believed the accused was presumed to be guilty, and he should have the burden of proving his innocence.

In that 10 years of I think a rather high visibility of the victims' rights movement, there has been an enormous shift in attitude toward the accused. The injection or the elevation of the victim at the pretrial and the trial stages I think is highly problematic in terms of the public's perception and understanding of who the accused is.

With regard to plea negotiations, I think my concerns are somewhat more specific in this way. We have historically in this country had a public prosecution system, or certainly that's what, thank goodness, has evolved; in which private concerns have to take a backseat to the public good and to public justice. Clearly what has happened and what can happen as a result of regulatory changes and statutory changes, is that prosecutors, and they certainly do this in the State of California, will weigh, consider, and factor in the attitudes and feelings of an alleged crime victim in reaching a disposition.

But I assure you that if the alleged victim has a seat at the table in plea negotiations, as a matter of fact when the victim makes a very public objection to a settlement which may be not only in the interest of the accused, but in the interest of the public good, and certainly favored by the prosecutor, that the outcry and the outcome will be that a judge will reject the negotiated plea because remember, again, I am being very pragmatic, these are individuals who stand for election. When publicized protest to a negotiated plea that may be in the best interests of all is made known, you will see agreements that are in everybody's interests falling by the wayside.

I am concerned because again, what it does is it substitutes private justice for public justice and public good.

Mr. BERMAN. Let me then just take that issue, because I think some prosecutors have expressed concern about the plea bargain aspect of the proposal. I would perhaps ask the attorney general his feeling here. I mean decisions to make plea bargains as I understand it, come for several different reasons.

Mr. PINE. Yes.

Mr. BERMAN. The nature of the victim is factored into it, but issues like the strength of the evidence, the desire to get higher ups in a criminal organization, to what extent will the victim's ability to articulate in the courtroom objections to the plea bargain. Victims and relatives of victims have been articulating objections to a potential plea bargain outside the courtroom for some time and have every right to do so. But to what extent will this mess up the ability to make decisions based on strength of evidence or desires to get more serious crimes prosecuted?

Mr. PINE. I don't see it as a major hindrance in the process. I would distinguish between the right to object or to address the court and the right to veto a potential disposition. I would not want to see that happen as a result of statute or constitutional amendment. I still believe that it is the people of the state versus the defendant. It is the Government versus the defendant. But I do absolutely believe having said that, that victims have every right to address the court on the impact of the crime, to express their desire as to what they feel an appropriate disposition is, even when it disagrees with the State's position.

I don't think that that ability to articulate in our State has changed the way in which we do our job professionally, trying to reach justice in each case. There are many times where a victim articulates their views, where they object, actually object to the proposed disposition. But the bottom line is we'll take the heat for that. We'll do our job in the way in which we best feel it should be done, recognizing that they have that right to object and to address the court.

As a practical matter, most of the time victims are—to have them involved informs them better, makes them understand the system, makes them feel more comfortable in the system, and that voice being heard, even if they disagree I think is an important part of the process. As a prosecutor, I encourage it, even when they do disagree.

So I do not see it as a hindrance to the plea negotiation process. I don't see it as a hindrance to getting a higher up in a particular kind of case and going up the ladder. I don't see it as a hinderance to the eventual disposition. There may be a judge who in some cases doesn't want to take the heat publicly and it could affect that outcome, but from my perspective, it's an important part of the process that they object or address the court. But I would not go so far as to give absolute veto power in the private cause of action that my colleague here has alluded to.

I do believe it's important as you frame this, to keep in mind it is the State, the Government, the people of the State versus the defendant.

Mr. HYDE. The gentleman's time has expired. The gentleman from North Carolina.

Mr. COBLE. I thank the chairman. I thank you all for being with us. You may recall when the first panel appeared before us, I shared with Mrs. Roper her comment that many people insist that the Constitution should not be tinkered with. Don't tinker with the Constitution.

Mr. HYDE. Tamper was the word used by Ms. Semel. This is a tampering.

Mr. COBLE. I thought she said tinker.

Mr. HYDE. It was tamper. I paid particular attention. It didn't amend it, it tampered with it.

Mr. COBLE. Well in any event, tamper. Tamper or tinker, if that view prevailed, the Constitution would never have been revisited. So I have no problem going back to the Constitution to make—I think maybe the key word might be frivolous. Don't tamper with the Constitution in a frivolous manner.

But if anyone believes that a double standard does not apply in this matter, he or she has been living under a rock for the past several years. A double standard applies, and I think it applies to the benefit, the luxury, if you will, of the accused rather than the victim. I'm not going to get emotional about this, but I go back to our first panel. Mrs. Roper no longer has the company of her daughter. Or said the lady from Ohio, Mrs. Christine Long, a victim of rape, has been emotionally scarred for her entire life. My constituent, Mr. Hodgin, has the company of his two sons no more. Gone forever. So I do get emotional about this I think.

I think, Mr. Chairman, we can also address this issue of trying to extend additional rights to victims that they no longer—that they don't have now, or they are not assured of it, I think we can do that without trampling upon the rights of the accused. I don't see that this is all this difficult to negotiate. I think it could be done in a rather evenhanded way.

Now having said all that, let me ask you all a question. Set aside for the moment your subjectivity, whether you are opposed or support what we're discussing today. Let us assume for the sake of a discussion that there will be an amendment. Are there particular successes or failures in current victims' rights laws with which you all are familiar that you would like to call to our—or direct our attention to the successes or failures? Start with the gentleman from Rhode Island.

Mr. PINE. I think there are particular successes that I would mirror with a Federal constitutional amendment. I alluded to it briefly before. I think the right to be heard at the time of disposition or sentencing is extremely important. I think even where it doesn't change the outcome, it may be a mandatory sentence in a particular case, the right of that victim or the family of the victim to be heard is fundamental I think to our process. It's missing from the process, and I think it's fundamental as human rights are concerned to have that as part of the process.

My concern would be as you word and draft the amendment and go through that process to be careful at what stage the right to be present, informed, and heard begins. I think you have to be careful not to involve that at a preliminary stage, an investigatory stage, or the grand jury stage even necessarily. But to be informed, notified and participating once that charge has been brought, once the

case is actually a judicial proceeding or public proceeding, I think would be the starting point when it actually becomes a case. So I would be cautious about that.

Ms. SEMEL. May I respond in this way and suggest that to the extent there are legitimate concerns that need accommodation, such as the opposition to the release on parole of someone who has been convicted and sentenced, those can be accomplished by statutory change.

What concerns me in the list of entitlements and benefits contained in this proposed amendment are the unintended consequences that they may bring about. Going back for just a moment to the question that Congressman Berman proposed, about how would plea negotiations be affected. When you confer a series of rights such as the right to object, there must be a remedy for the violation of that right. When, for example, an individual, alleged victim, is dissatisfied with the plea agreement and has objected and feels the objection has not been heard and taken into consideration, you will see the attempt to exert the remedy by way of injunctive relief and civil litigation. This simply, by the nature of the rights that you are conferring, both in the general and the specific, can not be written out of this amendment.

Mr. HYDE. The gentleman's time has expired.

The Chair would interject on this issue of plea bargaining, there's a real dilemma there. We all are aware of counsel, State's attorneys who all want to make a great record and they plea bargain everything they can to get a conviction, albeit at a very low sentence, a low crime. I can conceive of many victims never agreeing to a plea bargain. This is the most evil thing in my life and I want this guy prosecuted all the way. But what they may not know is the witnesses are lousy, the witnesses aren't available. You don't trust them. They have things in their background that if they came out, might destroy the case. So you have competing values. You have maybe the need for a plea bargain to get something, to get a conviction, or maybe to get testimony against more important far-reaching criminals, which may not be the concern of the victim at all. The victims wants this person.

On the other hand, you have the rights of the victim being dealt away in the dark without the victim having the slightest knowledge, much less anything to say about it. So those two situations need to be reconciled. We need to give it some thought.

I don't think a victim should be able to enjoin or by objecting or vetoing a plea bargain. On the other hand, there should be some objective review, and not just in the State attorney's office. I don't know, you're never permitted to talk to the judge ex parte, but maybe in a plea bargain situation, the prosecutor ought to be able to maybe go into the judge without defense counsel there and just say "Judge, this is a good agreement." I know how you feel, but you are selling——

Ms. GREENLEE. You certainly do know how we feel.

Mr. HYDE. You are selling the judge on the need for the plea bargain that you can't sell the victim on. Let defense counsel go in there too, ex parte, but somebody with some objectivity has to approve the plea bargain.

Ms. GREENLEE. That's the judge.

Ms. SEMEL. That's the judge.

Mr. HYDE. Yes, but you can't tell—you don't want the judge—you don't want to tell the judge your witness is totally unreliable, has a cocaine habit that won't quit. You don't want the other side to know that. But it's animating your entering into the plea bargain.

Ms. SEMEL. I think though, Mr. Chairman, just with all due respect, the way that discovery works, the reality is that when we reach that stage of plea negotiations, the recognition is that both sides realize the weaknesses or perhaps on both sides. One of the reasons there is this willingness on the part of the prosecutor is that he or she recognizes the defense knows the evidentiary problems.

Mr. HYDE. Well maybe. Maybe not either. Maybe not. There is a problem. I don't think the victim should be able to unilaterally enjoin, but they ought to be notified and have a right to express themselves. That much is certain, it would seem to me in that circumstance.

But anyway, we're not going to go pell mell ahead and amend the Constitution. But we are going to look at each of these problems. I don't think I share with you the preemption that you have for the accused that the whole Bill of Rights is written for the accused to protect the accused. I view the victim as every bit as important as the accused, and I think we have denigrated victimhood, real victimhood for a long time. They need some parity with the accused. That's what we're about here. How to fine tune that, so we don't goof up a system that's delicate to begin with.

But bringing the victims into the courtroom injects emotion. I'd almost be willing to stipulate to that if counsel would eschew using a motion in her closing argument. I won't hold my breath for that.

Anyway, Mr. Reed.

Mr. REED. Thank you, Mr. Chairman.

Attorney General Pine, you have a virtually unique perspective on these issues since Rhode Island does have a constitution that contains language affording victims' rights. It also has a statute implementing those rights. I wonder if you could just briefly outline the situation in Rhode Island, your experience with it, and perhaps differences between the Rhode Island experience and the Federal experience and any other concerns you might have.

Mr. PINE. I appreciate the question, because I think that over the last decade, I think the Rhode Island experience has achieved a good balance. I think that it has improved the system and to a degree, improved the public's confidence in the system, because it has enhanced victim participation.

Our constitutional amendment frankly does not go as far as the proposed Federal amendments that I have seen. The constitutional amendment in Rhode Island as passed about a decade ago, talks about a victim of crime being treated with dignity, respect and sensitivity during all phases, entitled to receive financial compensation, which is different from the order of full restitution that appears in the Federal counterpart.

Also, our right to participate in the constitutional framework talks about before sentencing the victim shall have the right to address the court regarding the impact, which the perpetrators conduct had. I have seen that expressed in a number of ways. Judges

have sometimes cautioned victims not to make a recommendation as to what they want to see the result be, but merely talk about the impact which the crime has had on them and on their family. I think that that is working quite well. I think that victims feel a sense of recognition through this constitutional amendment and a sense of participation and respect, I hope so, I'm sure not 100 percent, but I think it has improved greatly.

Our statutory framework, which was implemented to follow the constitutional principle, is kept I think or particularly broad. I think that the constitutional framework was designed to be rather broad so that a specific statute could implement it.

The statute basically talks about the right to be notified from arraignment on, at the time of sentencing, at the time of parole board hearings. We have a constant continuum of information that can be provided to victims to be notified about various proceedings. I think that that too is not either overly burdensome or overly a hindrance to the process.

We actually in my office, handle the victim notification. We have a staff of about seven or eight individuals mailing the letters, making the phone calls, doing the followup, as well as accompanying victims to court. It's a staff of seven or eight to cover several thousand cases. They work hard and they are over burdened to some extent by the workload, but they get the job done. So I don't see the cost factor as having been a major one over the last 10 years in our particular department. It therefore differs I think in some respect from the Federal counterpart, which I think would involve additional costs that have to be considered. I would caution the committee to recognize that.

Depending on when you start the process, it's going to involve additional costs to law enforcement, and also the latter section about reasonable conditions of confinement or release for the accused or convicted offender, to protect that victim. I think that that could have a cost factor as well, which is not present in our structure.

So I would be careful to explore those two phrases as I see in the draft version, to consider what costs that might have on law enforcement, police departments, parole boards, prosecutors, et cetera.

Mr. REED. Just a quick followup question. Supposing that a constitutional amendment is adopted at the Federal level, any concerns about the interrelationship with the existing Rhode Island structure, which is working well by your testimony, I think by my experience too. I wonder if there's any specific concerns there too?

Mr. PINE. I think there could be. I think for those States that have some version, but not going as far as the Federal version, the supremacy issue would come into play. I think for those States that have nothing, it certainly would come into play.

I am in favor of the Federal constitutional amendment. I think the principles enunciated are important and should be codified. But I would be careful about the wording. That's what I alluded to earlier. I think you are hearing from various groups, certainly the National Association of Attorneys General having been involved in the resolution process going back over a decade, wants to be involved

in wording that everyone can live with and wants to be at the table when that occurs.

Mr. REED. Thank you, General. Thank you, Mr. Chairman.

Mr. HYDE. I might say, General, that we would eagerly welcome the work product of the association. The time is now.

Mr. PINE. Thank you. We will work with you.

Mr. HYDE. Thank you.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. We have heard a lot about the protections for the defendants. Those protections are against overbearing Government, like the Government bringing a subsequent trial after an acquittal, requiring a speedy trial, protection against search and seizure. Those are Government actions. They are also things that probably wouldn't pass if you stuck them on a referendum or through the normal legislative process.

My policy is that we shouldn't amend the Constitution unless it's necessary. As I guess the chief prosecutor in your area, what is your office doing to victims that need constitutional protection that can't be fixed by statute or Executive order?

Mr. PINE. I am not sure I follow.

Mr. SCOTT. The problems that you are trying to address with a constitutional amendment, which of those problems can not be addressed by statute?

Mr. PINE. I think that a lot of them can be addressed by specific statutes implementing what we have in our State as an amendment to the constitution.

What I think is important is to recognize the need to have it codified in the Federal Constitution.

Mr. SCOTT. I mean you kind of speaking in generalities. What is your office doing to victims that can not be fixed by statute?

Mr. PINE. I think a lot of it can be fixed by statute is my answer, and has been.

Mr. SCOTT. Then that would raise a question as to the need for a constitutional amendment.

Mr. PINE. Right. That is what I was trying to get at.

Mr. SCOTT. If we have a constitutional amendment, would you want a provision in there that there would be no remedies, or should the victims have remedies for violations of the constitutional amendment?

Mr. PINE. I think that, and again, I'm not speaking for the association, but one of the concerns that was raised and is raised by prosecutors, is the nature of the remedy. Will there be private causes of actions for damages against those who violate it.

Mr. SCOTT. What kind of remedies would you suggest for people to enforce their constitutional rights by virtue of a constitutional amendment if this were to pass?

Mr. PINE. I am not sure what the remedy should be.

Mr. SCOTT. Should there be remedies?

Mr. PINE. I'm not sure that there should. I think——

Mr. SCOTT. Should there be a provision that there be no remedies?

Mr. PINE. I think the draft language that I have seen is something that at least is a starting point for the discussion, that it would not provide or give rise to a cause of action for damages, et

cetera, et cetera, against any public officials. Some of the drafts I've seen——

Mr. HYDE. Would the gentleman yield just for a second? On the philosophical question of having a constitutional right that has no remedy for its derogation, I think that's really almost oxymoronic. There ought to be some remedy. Now maybe not a specific remedy, but injunction ought to be available, injunctive relief.

We ought to really think about that. We don't want to slow the process of criminal justice up. But if you have a right that is constitutionally asserted, that ought to be enforceable some way or other. We have to figure that out. That's where your association could help us.

Mr. PINE. That is why I think what you put into the specific nature of the rights that you are giving victims, that the wording that is choosen is very important. As beyond statement of principle, if you are giving a right to full restitution, where is the remedy for that, knowing that——

Mr. SCOTT. Let's get to the specifics. Do you support the constitutional amendment as it is presented before us?

Mr. PINE. Which version? I have seen 173, 174.

Mr. SCOTT. Either one?

Mr. PINE. I think that—let's get them right.

Mr. SCOTT. Well let me ask another question before my time ends up. Do you see litigation possible on who a victim is and who is entitled to these rights?

Mr. PINE. I think it has to be defined by State statute, as we've done, to define who is a victim.

Mr. SCOTT. If you have an insurance fraud case, does everyone who qualifies as a victim have the right to intervene?

Mr. PINE. I wouldn't think necessarily, no. I think in our State we have defined it as having suffered personal injury or property injury to be entitled.

Mr. SCOTT. You have had insurance fraud, widespread insurance fraud—well, do you see the individual limitation in either of these versions?

Mr. HYDE. I'll give the gentleman additional time, because I took some.

Mr. PINE. No. I have not seen the limitation in those versions. I have seen it proposed in some other draft.

Mr. SCOTT. If I could just make a comment. We all agree on the principle in the policy, but when you put it in a constitutional amendment, the idea that you would have a constitutional amendment without a remedy really makes the whole idea silly. If you have a remedy, apparently you have serious reservations about what those remedies would be. You wouldn't want an injunction against the plea agreement. You wouldn't want to have someone have the right to a hearing as to whether they are a victim or not a victim and slow up the process. How would you ever enforce this idea?

It seems to me that what we are trying to get to can be gotten to if your office would do a better job.

Mr. PINE. I am saying that there may in fact be an appropriate remedy for egregious violations of the right. I am saying that there are many situations in which there are good faith efforts by pros-

ecutors and law enforcement to comply with the particular mandate that would not necessarily give rise to——

Mr. SCOTT. If you would go ahead and notify the victims, if you would treat them other than as a piece of evidence as human beings, we wouldn't have this problem. We wouldn't need a constitutional amendment.

Mr. PINE. I don't know if it's just us. I think it's the system. I think the problem for the public is not so much prosecutors as it is the system in general that they lack confidence in. Part of that lack of confidence comes from the fact that it is the defendant that always seems to be getting every benefit and the victim who gets trampled on.

That is not happening because of prosecution offices. That's happening because of a very cold system that doesn't treat victims as humans.

Mr. SCOTT. You have not been able to point to anything that couldn't be fixed by statute. Here we are considering a constitutional amendment.

Mr. PINE. I am saying that many of the things can be fixed by statute. Specific statutes dealing with victim notification can certainly be implemented. But why not have a principle in the Constitution recognizing the unique status of victims, and recognizing their right to be heard.

Mr. HYDE. The Chair would intervene, that all the rights of the accused could be fixed by statute too. But they are in the Constitution. The dignity of the status, the legal status, the standing in court of the victim needs to be made parallel.

Mr. SCOTT. Mr. Chairman, if I could be given about 10 more seconds.

Mr. HYDE. Sure.

Mr. SCOTT. The whole point of these constitutional amendments protecting the defendant are that they could not pass—you could not pass a prohibition against double jeopardy.

Mr. HYDE. You mean that people wouldn't vote for it?

Mr. SCOTT. They would not vote—if you had evidence——

Mr. HYDE. Well, in a democracy that's a real problem.

Mr. SCOTT. If you had newly discovered evidence and someone was clearly guilty in a high profile case, double jeopardy would go out the window in a legislative vote.

Mr. HYDE. We have a great double jeopardy case in Chicago where a known syndicate killer was found not guilty by the court. The fix was in. That was established. They reindicted him and he pled double jeopardy. They said the first trial wasn't a trial. It was a charade. That has been upheld by the Supreme Court. I think it's one of the fascinating nuances of double jeopardy.

Anyway, if you are——

Mr. SCOTT. My point is that the constitutional amendments—the Constitution protecting the defendant are things that are unpopular, that in my judgment would not be able to be sustained in a normal majority ruled democratic process. That's why they are in the Constitution.

The things that would protect the victims could easily pass the legislative body, and therefore, do not need the status of a constitutional amendment. That's the only point I'm making.

Mr. PINE. It's a philosophical question at its root, because if you believe that people who intentionally thrust themselves into the criminal justice system by committing serious crimes of their own volition are afforded all these rights, why are you not giving the same dignity and respect to those who are innocent victims and who are being thrust into the system?

Mr. SCOTT. You haven't said anything that the victims couldn't get by statute.

Mr. HYDE. I'd like to say to my friend from Virginia that I never heard those arguments when the ERA was being advanced. I always felt that the what the equal rights amendment would help women with was in the Constitution. We didn't need it. No person shall be deprived of life, liberty or property without due process of law. Nor shall any person be deprived of equal protection of the law. What did the ERA do but reiterate that. But I never heard arguments that we don't amend the Constitution only when it's necessary on that issue. But God, let's not open that up.

Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chairman. Actually I've enjoyed listening and I'm glad I can pop into the debate.

A quick comment, then I'll ask some questions. I've never known the Constitution to be known as a document to defend the popular and uphold those who happen to be with the public's mood at the time of a debate. The Constitution, as I think the gentleman from Virginia was trying to point out, has always been there to try to protect the unpopular. In this case, we're talking about criminal law, the defendant or the accused. Certainly I think he is correct. We would never have a chance to get by any popular vote or any vote of any legislative body, an amendment or a bill, a statute, which would protect an accused far beyond what I think the general public believes would be sufficient for adequate trials, which unfortunately is not enough in most cases.

Let me ask a couple of questions. Attorney General Pine, I hate to do this to you, but it was an intriguing question. You didn't quite give a specific answer. Are there any particular items that you'd like to have in a constitutional amendment that you don't believe can be protected through a statute?

Mr. PINE. I think the philosophical statement about the status that victims have in our society is an important one. I don't know that that can just be covered by the statute.

From my point of view, you can implement as a practical matter the principle through a statute. But our Constitution is worded in such a way, the principles of free speech, the principles of equal protection are broadly stated.

Mr. BECERRA. You are asking or you are saying that you believe we should elevate a philosophical statement to the status of constitutional protection, because you don't think we can do it through a statute.

It seems to me a philosophical statement wouldn't have any force of law, whether it's in statute. I guess it would if it's in the Constitution. But why are we trying to make philosophical statements in the Bill of Rights?

Mr. PINE. Because the Bill of Rights is a statement of the philosophy of this country and the protections that we believe all Americans should have. I am simply saying that if you——

Mr. BECERRA. I would disagree. I don't think the philosophy of the people of this country is to give, as the chairman may have pointed out, someone who we know is guilty a chance to escape punishment because in the first trial there was by some chance, a person escaped punishment.

Mr. PINE. I disagree. I mean the Framers put that in for good reason, because they felt that it would be better that one innocent person or one guilty person go free than an innocent person be convicted.

Mr. BECERRA. I agree. There was good reason to put that in. It wasn't a philosophical reason. It was a good reason to protect individuals and their rights.

Mr. PINE. Let me try to answer it in a different way. I believe that we go a long way to protecting the rights of people accused of serious crimes. That is embodied in our Constitution. We do nothing for the rest of society, as far as I'm concerned, about according them the respect and dignity in the criminal justice system as a matter of right that they deserve. This would accord them that respect and dignity and participation as a matter of right, as a matter of fundamental right for that vast majority of Americans who are either victims or potential victims.

Mr. BECERRA. How would you compare the right, if we were to have a victims' bill of rights in our Constitution, that would say that the victim is entitled to see a speedy trial administered? How would you weigh that or balance that compared to an accused rights to a speedy and deliberate and full trial?

Mr. PINE. I think courts could do that. I think that if there is a right to a speedy trial or a resolution without delay, however it is worded, and a victim I think has that right, I think that a court can balance as it would in any other situation, that right versus the defendant's right. In fact, as a practical matter, those who are in the system would tell you that most of the time it is the prosecution that is banging on the door for the trial, not the defense. Most of the delay is usually on the other side, for I think delay benefits the defendant, not the victim.

Mr. BECERRA. Ms. Semel, I think you wanted to join in on us?

Ms. SEMEL. Yes. I did. I wanted to remark that whether or not you express it philosophically, once you begin to use words like respect, dignity, justice, or protection in a constitutional amendment, we get back to the problem we had initially, which is, what is the remedy for the violation of the expression of those philosophically held rights. Pragmatically, even if we take the speedy trial example, if the alleged victim complains that the trial is not proceeding expeditiously, even to the detriment of the prosecutor's ability to present and put his case together, we will see crime victims seeking injunctive relief, seeking to force cases to trial before, for example, the prosecutor is ready to do so.

Again, with regard to speedy trial issues, we have Federal statutes providing for them. Certainly we have State statutes providing for them, and may be able to weave into the statute some appro-

priate consideration of the interests. We did in the State of California, certainly, of alleged victims.

Mr. BECERRA. Mr. Chairman, if I can be indulged for just one last question.

Mr. HYDE. If the gentleman will yield to me, I'll indulge the gentleman. I do agree with what Ms. Semel just said. The exigencies of a speedy trial could depend on the volume of cases, the availability of the lawyer that you choose, who has many other cases ahead of him, more serious maybe, the need of the defense counsel to get paid before he goes to trial is sometimes unspoken, but a very cogent reason for getting a continuance. It's very hard to get paid after the conviction comes in.

I think some acknowledgement, even constitutional acknowledgement of the entitlement to a reasonably speedy trial, given all the circumstances which should be under the control of the court is not untoward at all. But it shouldn't be with no flexibility or wiggle room so that cases have to be dismissed if they are not speedily heard. But there may be good reasons, good and sufficient reasons why the case can't go ahead today or this week. But the notion that a reasonably speedy, expeditious trial is everybody's entitlement. I see nothing wrong with acknowledging that in the Constitution.

Mr. PINE. I would agree with that.

Ms. SEMEL. Mr. Chairman, again, if the committee takes a look at the statutes in effect in many States that have taken this into consideration, it will find this again, that by statute, preference or priority. For example, in child abuse cases in the State of California,the preference for speedy trials is expressed. I think I would strongly urge those kinds of statutory changes—so that the direction of courts can be given guidance with regard to which cases take priority.

Mr. HYDE. I agree. It's like unfunded mandates. Everything has a priority. God help the poor personal injury case that doesn't have some urgency to it.

Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chairman. Let me direct this to Ms. Semel and to Ms. Greenlee. How do you address the concern of those who say that even in States where we have these victims' bill of rights within their constitution or even the Federal statutes that we have to protect victims, what you find is that you have prosecutors who are very leery of allowing victims to exercise those rights because ultimately they are very concerned that if they gain a conviction, the defendant might appeal on constitutional grounds, and say that those statutes or State constitutional provisions that were used to allow victims to participate, ultimately denied the defendant a fair trial. So on constitutional grounds, the defendant—U.S. constitutional grounds, the defendant now seeks to appeal the conviction and overturn it.

Ms. GREENLEE. We have had 5 years of experience with our State statutes. There has yet to be any appeal along that line taken, in Pennsylvania.

Mr. BECERRA. That isn't that we won't have it. But give me a better argument than it hasn't happened yet.

Ms. GREENLEE. Well I think 5 years of experience would indicate that that is probably not going to happen, especially since——

Mr. SCOTT. Is that the defendants?

Ms. GREENLEE. No. That defendants have not made any kind of appeal that they were denied due process for fair trial because victims' rights, as embodied in our statutes, were upheld.

Mr. BECERRA. Actually, the gentleman from Virginia brings up a good point. What if the victim were to try to appeal?

Ms. GREENLEE. Pardon me?

Mr. BECERRA. What if the victim were to later try to appeal, claiming that there was either coercion or intimidation on the part of the prosecution to not exert his or her rights or wasn't fully informed of his or her rights, and now seeks to appeal the conviction? I doubt that would be the case.

Ms. GREENLEE. There is no such provision in any statutes for the victim to appeal the verdict.

Mr. BECERRA. That gets back to the whole issue of the remedy. There is really no clear remedy that can be provided.

But let me focus on just the defendant ultimately appealing. I know you are telling me it has not happened, but certainly that's not enough for us to decide whether or not we should pass laws because it yet hasn't happened. What if it should happen? How do you deal with that situation where someone decides to appeal because he or she as a defendant claims that the conviction resulted from the victim's participation and ultimately denied that defendant a fair trial until the U.S. Constitution?

Ms. SEMEL. It already has happened in a sense. One can take a look I think at the *Norris* case, which is cited in the NACDL's written testimony, the situation where victims' rights advocates were wearing buttons and expressing themselves in a highly emotional manner in the course of a trial. The court became very concerned about the influence and the impact of that emotional and passionate expression on the trier of fact, on the jury. Ultimately, the conviction had to be reversed.

But the concern would be, and the court was emphatic in its concern, about whether or not that defendant in that circus atmosphere received a fair trial. Consider Leo Frank, who was convicted as a result of a lynch mob mentality, anti-Semitic mentality in Atlanta, and ultimately was lynched. So we know these things happen.

If we give the victim a coequal position in the courtroom, I think we may very very well tie the hands of judges to control the proceedings in an appropriate fashion so that at the inception, when the focus is on, is this accused person guilty of a crime beyond a reasonable doubt, the court will not be able to enforce the mechanism that will ensure at the end of the day that that trial was fair. That really is in the interest of all of us.

So I think we have to be very very concerned about interfering with the judicial ability to control the trial proceedings and ending up in a situation where a defendant can say yes indeed, this was a trial that ran amuck. We are better off, again, with statutory changes which give judges the power to control their proceedings in an appropriate manner.

Mr. HYDE. The gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you very much. I would like to state the obvious, which is that I thank all of the parties

in this panel, and I apologize for not hearing your testimony. There are dual hearings going on, one of which engages in another sin, if you will, is the denial and elimination of affirmative action.

But we realize that in the course of trying to justify the rights of citizens, there is a tension, the defense, the prosecution, and victim. Part of the value of a system of justice that we have is that tension continues to pull either away from each other or it provides the normal knocking. We hope that in this process in the hearing that we're having today, that we can find the appropriate balance.

I do think it is valuable to have the protections enunciated in the Constitution for those who have been accused. Although many of us now are maybe filled with apprehension, because of the enormous rise in crime that we have had in this century, it still should be recognized that the value of the Constitution that we support gives all citizens a fair right to face his or her accuser, but as well to be defended and to be ensured to be protected against unreasonable search and seizure, and of course the right to not incriminate one's self.

At the same time, I would like to offer that there are an enormous litany of tragedies and stories about victims. I think the Oklahoma City scenario comes to mind because it's so large with respect to the number of victims, and of course the enormity of their plight and what they would represent being in the courtroom.

But I would ask Ms. Semel from California, who represents those who clearly are part of upholding the Constitution and providing us with our rights, how you have interacted with the constitutional provision in California. I know you represent vast numbers of defense lawyers, but because you are personally in California, tell me how that works and what you have seen practically in the courtroom or what you have heard practically in the courtroom as that particular constitutional amendment is played out in California.

Ms. SEMEL. I think I said earlier, and I would fairly describe it as a sea-change in perception, in attitude. I think it is fair to say that the good news is that there is, and not really I would say as a result of constitutional amendment, but as a result of statutory change and increased sensitivity and training of prosecutors and law enforcement, there is a fairly systematic relationship between witnesses and alleged victims in criminal cases. But I don't believe this has anything to do with constitutional amendment. I think it has to do with a movement, a visibility.

That ultimately is all to the good, in the sense that I venture to say that individuals who are victims and witnesses in California feel a greater sense of being informed and aware and involved at various stages of the proceedings. But I also see some serious downsides. I mentioned earlier that I have grave concerns about what has happened to the presumption of innocence as a result of the presence of victims' advocacy groups, at bail hearings, and at all stages of the proceedings, not just at sentencing when someone has been convicted.

I think we in California, and I think about the Polly Klaas case as an example, run a grave, grave risk of convicting people before they are put on trial. So therefore, I am highly highly, skeptical and concerned about shifting, and undermining, the presumption of innocence and burden of proof. I think that on a pragmatic basis,

the kinds of needs that victims have to be treated sensitively, to be informed, and to participate certainly once an individual has been convicted, can be accommodated and accomplished, and have been in California, by statute, without the need for a change in our fundamental constitutional rights.

Ms. JACKSON LEE. May I have a similar, just general response from Ms. Greenlee? As you are making your response, if the chairman would indulge me to have you make your response. I emphasize the tension that we're facing here between justifying or at least affirming the rights of victims, and as well, upholding the constitutional protections.

I hope, Mr. Chairman, as we deliberate, and earlier we were told that this is a work in progress. I hope the victims will help me understand as we move toward trying to design something that answers many of these concerns, to distinguish between a protest and victims' presence who are a part of victims' groups versus the victims who are particularly relevant to the case in point.

I would have great concern to masses of individuals not related to the proceedings damaging the prosecution's ability to prosecute, and a defense ability to defend, so that if we have a guilty party, it can be upheld. You know, I would be very concerned. I'm not sure if that is what you have said. I certainly think that it is reasonable to have people advocate their positions globally. But when you have court proceeding, I would be very concerned that what we're talking about in terms of emphasizing the victim. In my mind, the victim is the one that is related to the incident at the time.

Ms. Greenlee, can you tell me clearly how if you have had any encountering with either constitutional amendments or statutes on the State level, and how it interacts with your defense perspective.

Ms. GREENLEE. Actually, the comment that ran through my mind was that California seems to always be first with all the wild and weird things that happen in the world. We have not seen in Philadelphia, and probably not in the rest of Pennsylvania, which is a fairly rural State, any victim advocacy groups that have been so apparent in courtrooms in terms of trying to influence the actions that go on and to influence the fact finder.

We have no prohibition against victims or victims' families being in courtroom during trial. The only time would be in terms of the exercise of judicial discretion in terms of sequestration if that were called for or requested and granted by the court in terms of any witness to the case who might be requested to leave the courtroom. But we have a family of victims, always especially pronounced when it's a matter that involves the police, who usually ring the courtroom in terms of trying to influence the jury in a way towards the prosecution.

So other than—I can only speak to our experience. I don't know of any complaints, serious complaints that I'm aware of that protection of victims' rights is in any way not being seen to by the broad statutes that we have in Pennsylvania.

Ms. JACKSON LEE. Thank you. Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Ms. Jackson Lee. Does Mr. Watt have any questions?

Mr. WATT. Mr. Chairman, I appreciate the offer, but I think I've been in and out, and I've heard the testimony. I won't be redundant and ask any questions. I'll just look intently at the witness statements. I appreciate the witnesses being here.

Mr. HYDE. Thank you very much. Well, this has been an excellent panel really. You have made a great contribution to our understanding of what we're getting into. It has, as I say, it's made a great contribution.

I think the most salient thing I heard was Mrs. Roper, who said that victims are not going to cooperate any more if they are treated like things and pieces of evidence, and not human beings who are the object of the injustice of which they complain. I think when people stop cooperating with law enforcement, our whole justice system collapses.

So we must look at the victims with a little more respect and a little more consideration, and understand that the Constitution and the Bill of Rights belongs to them as much as the accused, even though we've been more explicit heretofore in the Constitution about the accused rights. But we the people, in order to form a more perfect union, established justice. That means the victim, the victim, who has been assaulted one way or the other. So they have an important role to play. Concededly we have to be careful not to obstruct justice by improvident and overweening language in an amendment. But that there should be an amendment to equal victims with the accused, I am convinced. How we formulate that so as to accomplish what we want to accomplish, nothing more but nothing less, we all have to think about and work on. Your contribution has been considerable. Thank you very much.

The meeting is recessed until 3, when we have our final witness.

[Recess.]

Mr. HYDE. The committee will come to order. Our final witness is John Schmidt, the Associate Attorney General of the United States. He has served in that position since July 1994. Before that, he served as the Clinton administration's chief negotiator to the Uruguay Round world trade talks.

Before joining the administration, Mr. Schmidt was in the private practice of law, and was active in civic affairs in my home city of Chicago, for which Chicago is all the better.

I am glad to have you here today. We look forward to your testimony on behalf of the Department of Justice.

STATEMENT OF JOHN R. SCHMIDT, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SCHMIDT. Thank you, Mr. Chairman. I am delighted to be here. I first of all want to thank you for your leadership on this issue. Thank you for scheduling this hearing. I particularly want to thank you as a personal matter for reconvening this afternoon so that I could be here personally. This is an issue that a lot of us in the Justice Department have spent a lot of time dealing with. But it's something that I have come to believe very strongly in myself. So on this first occasion when we've been able to present the views of the administration since the president announced his support for a victims' right constitutional amendment, I had very

much wanted to be here myself. I appreciate your having accommodated that scheduling.

I'll be very brief. We've submitted a full written statement. I think that one of the strengths of the victims' rights amendment is that although it is enormously important, it is fundamentally simple and straight forward. I don't think it requires an enormous amount of explanation or complicated discussion in order to have an understanding of what it is that we are attempting to achieve.

As you know, the president announced his support for a victims' rights constitutional amendment. He announced that not only in general terms, but he identified specifically rights that he believed should be guaranteed in that amendment: the right to be notified of court proceedings, the right to attend, the right to be heard if present prior to a decision on bail or on the acceptance of a plea or on sentencing, a similar right to receive notice and to attend and to be heard at parole hearings, the right to restitution from the defendant, the right to reasonable protection against the defendant during the pretrial period, the right to be notified in the event the defendant is convicted and then is ultimately released from jail or escapes, and the right to be notified of those basic rights.

The President also identified what we characterized as cautionary principles that we thought were important to be reflected in the language of an amendment. One was that we not do anything that would interfere with our ability to effectively prosecute criminal cases. The second was that we not do something that would expose local governments or local officials to monetary damages. A third was that we not do something that could conceivably result in the reversal of convictions.

The President did not endorse specific language. His conclusion was that putting out a competing text was not the way to go. But he directed the Justice Department and lawyers from the White House Counsel's Office to work together with those who have been supportive of these amendments—yourself, Senators Kyl and Feinstein, advocacy groups, others in the Congress—and seek to see if we could reach a consensus on a precise form of amendment that we could all support and go forward with.

I am happy to say that, as you know, those discussions have already begun. We have had some discussions with you and members of your staff, and with Senators Kyl and Feinstein and with members of their staffs, and with others in the Congress. I think we have already begun to see in the revised drafts that have been circulated recently some reflection of some of our comments and comments being made by others.

I think that all of us who have been in those discussions are approaching it on the basis that this is a constitutional amendment that we are drafting. It is something where there should be no pride of authorship. There should be no reluctance to take language because it's somebody else's language. There should be no reluctance to change things as we go along with this process.

This is not an ordinary statute where we're going to be able to come back in a year or two and change it. If we go forward with this it will ultimately become part of the Constitution. So I think we've all approached it, and I think everyone has to approach it on the basis that we have to do everything possible to get it right. I

think in the discussions that we've had so far we've been optimistic that everyone is proceeding in that spirit.

Let me take just 2 minutes and explain why I have come to believe we need a victims' rights constitutional amendment. To me, there have always been two questions. Should victims have these rights? Second, do we need a constitutional amendment in order to guarantee them? I think for most people, the first question is easier than the second.

On the first question, we're talking about rights that I think have come to represent a very broad consensus view in this country about rights that victims of crime ought to have. That's a consensus that has really been educated over the recent decades by victims and by victims' advocates. I think these are rights that a lot of people are surprised to find they are not already guaranteed. I think when people are victims of crime they are really startled to find that the proceeding, the whole court process, might go forward without them ever knowing about it. I think they are startled to find that someone who had say, assaulted them, could be released from prison without them being told about it.

So I think we're talking about rights that reflect a broad consensus. I think that is an important fact when we talk about a constitutional amendment. I don't think we're talking about something here where we have a 51-49 majority that might shift tomorrow with respect to these rights. I think these are basic rights. I think there is a broad consensus that they ought to be respected.

That still leaves you with the second question, which is do we need a constitutional amendment in order to protect them? That is inevitably a harder question because none of us amends the Constitution lightly. We can't amend it lightly. It's an enormously complicated process. We will never do it unless there is a very compelling case that these are fundamental rights that can only be achieved through a Federal constitutional amendment.

My own view is that the case for that, for saying that only by a constitutional amendment will we achieve these rights, is an extremely compelling and persuasive one. It has to do in apart with the fact that it is only through a Federal constitutional amendment that we will achieve a basic degree of consistency in the definition of fundamental rights applicable to the whole range of criminal proceedings, Federal and State, throughout this country. Without a Federal constitutional amendment, we will inevitably have a patchwork. We will not have a situation where you can say what it seems to me we ought to be able to say: If you assault somebody and get arrested, you know you will have certain basic rights as a defendant. You ought to be able to go anywhere in this country and, if you are a victim of crime, know that you will have certain basic rights guaranteed to you. That is something that can only be achieved through a Federal constitutional amendment. Only the Federal Constitution can speak authoritatively over the whole range of criminal proceedings, Federal and State.

There is a further point. I think even if we could wave a magic wand and miraculously pass an identical statute in every State or even an identical State constitutional amendment in every State, I think the fact is that we would not have achieved, and we would not achieve, the kind of recognition of these basic rights that is

needed. I think a major reason for that is that we have come to look to the Federal Constitution for the definition of basic rights in the criminal process.

I think this discussion would unquestionably be different and the case for a constitutional victims' rights amendment would be different if we didn't have the sixth amendment. If we had not chosen to define explicitly in the Federal Constitution a set of rights for defendants, I think it would be different. With respect to the States, if the Supreme Court had not chosen to apply that specific set of Federal rights to the States through the incorporation doctrine, it would be different. But we have made that choice. I think it was the right choice.

The result of that is or that we have a set of specific rights guaranteed to defendants in the Federal Constitution. Unless and until we grant a similar explicit set of rights to victims in the Federal Constitution, I think it's clear we will not achieve the kind of universal recognition of those rights that we need. For one thing, as long as the defendants' rights are in the Constitution and victims' rights are not, any whiff of conflict between the two will always be resolved in favor of the defendants' rights. That in fact happens today around the country.

But even apart from issues where there is an actual conflict, I think even when there is no conflict, the fact is that courts look to the Federal Constitution for the definition of basic rights. We're talking about literally hundreds of thousands of proceedings, tens of thousands of courtrooms, thousands of jurisdictions. Today they look to the Federal Constitution, and they find defendants' rights. They are generally respected. I think the fact is unless and until they look to the Federal Constitution and find a similar set of guarantees for victims' rights those victims' rights will not be similarly respected.

So in the end, to me, the two questions become one. If you believe victims have these rights, should have these rights, I am convinced that as a practical matter we will never achieve their consistent nationwide recognition unless we put those rights into the Federal Constitution.

Let me stop with that. I would be glad to answer questions. Let me just reiterate that we look forward to a continuing process of working with Members from both sides of the aisle. This is obviously something that transcends partisanship. It transcends ordinary legislative process. It's something where, as I said before, we're talking about the Constitution. I do believe if we do it right we can all leave a legacy that will be important to victims of crime and future generations and can be beneficial to the entire criminal justice system.

[The prepared statement of Mr. Schmidt follows:]

PREPARED STATEMENT OF JOHN R. SCHMIDT, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman, Mr. Conyers and Members of the Committee, I appreciate the opportunity to present the views of the Administration on amending the Constitution of the United States to establish fundamental rights for victims of violent crime. I particularly appreciate your reconvening the Committee hearing so that I could appear here in person today.

I know each of you shares with the President and the Attorney General a profound respect and reverence for the Constitution. Its creation was the result of the

genius of this country's Founders, and its vitality over the last 200 years is a reflection not just of that genius but also of the American spirit. Thus, I think all of us should rightly begin any consideration of an amendment to the Constitution with caution and even, perhaps, skepticism. But we must not forget that our nation's Founders themselves anticipated that for a nation to survive and flourish it must have the ability to change its charter through peaceful, orderly processes. Article V of the Constitution provides the methods by which the Constitution may be amended—methods that have been successfully used throughout our nation's history.

Mr. Chairman, as you know, on June 25, President Clinton announced his support for a Constitutional amendment to protect the rights of crime victims. We in the Administration believe that such an amendment is the only way to safeguard fully the rights of victims of crime. Many who oppose a victim's rights amendment claim that the criminal justice system already adequately supports victims and protects their rights, and that, to the extent additional protections are needed, they can be provided by statute and executive action. We disagree: our national experience is that victims rights laws already on the books have proved inadequate. We believe an addition to the Constitution is needed to open the criminal justice system to victims and to ensure the opportunity for their participation in that system.

President Clinton said it best in his statement of support for the amendment when he said:

> When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in. Participation in all forms of government is the essence of democracy.

I have attached the full text of the President's statement and ask that it be included in the record of this hearing.

I am here today to explain fully why the President and the Administration believe that the only way effectively to safeguard these rights is through an amendment to the Constitution, and to share with you some observations about the content of such an amendment.

Although I will address both of these issues in greater detail below, I want to briefly summarize some of our thoughts here. When the President initiated the Administration's review of this issue, the President wanted the answers to certain tough questions: Should the rights of victims to participate in the criminal justice system be given the same Constitutional status as the right of criminal defendants to counsel, the right of members of the media to attend criminal trials, the right of others to demonstrate before the courthouse, and the other rights found in the Constitution? Is it necessary to amend the Constitution to protect the interests of crime victims or can we achieve the same level of protection through legislation or regulation? And, finally, would an amendment provide real rights to victims that could be enforced or would it simply be a symbolic, but largely empty, gesture? As you know, based on our answers to these questions, the President and Attorney General have concluded that the right thing to do is to support an amendment.

As we go forward with the process of developing the text of that amendment, however, I want to encourage you to keep several principles in mind. *First,* the amendment should clearly and unambiguously set out what specific rights it is extending to victims of crime. The President supports an amendment that provides the rights of victims:

> to be told about public court proceedings and to not be excluded from them;
> to make a statement to the court, if present, about bail, about sentencing, and about accepting a negotiated plea;
> to be told about parole hearings, and to attend and to speak if present;
> to notice when the defendant or convict escapes or is released;
> to appropriate restitution from the defendant;
> to reasonable conditions of confinement and release to protect the victim from the defendant; and
> to notice of these rights.

Second, the amendment must be carefully crafted to ensure that it does not unintentionally hamper the ability of criminal investigators and prosecutors to do their jobs. We should never lose sight of the fact that the very best way that those of us in the criminal justice system can serve victims of crime is to bring the responsible criminals to justice.

Third, an amendment protecting the rights of victims should not deprive those accused of crime of their rights. We can have a criminal justice system that both respects and protects the victims of crime as well as ensures that those accused of such crimes receive a fair trial. We cannot accept less.

And *finally,* all of this must be done in the context of the Constitution. We are not writing a statute to add to the United States Code that can go on for many

pages and resolve every question of application. Each word in an amendment takes on great significance. In our work together we must choose the words for this amendment with great care.

THE NEED FOR A CONSTITUTIONAL AMENDMENT

President Clinton and Attorney General Reno have longstanding interests in and commitments to the strengthening of rights for crime victims. The President's involvement in this area began with his submission of victim compensation proposals while serving as the Attorney General of Arkansas. As Governor of Arkansas, he signed legislation which required notification of victims before parole hearings, established provisions for victim restitution, required hospitals to treat sexual assault victims, and guaranteed the right of victims to be present in the courtroom. Following his election as President, this commitment continued through the President's support in the Violent Crime Control and Law Enforcement Act of 1994 for such measures as the right of violent crime victims to be heard in sentencing, payment for testing of sexual assault victims for sexually transmitted diseases, and "full faith and credit" for protection orders in all states. He also supported reforms to strengthen restitution for victims in the 1994 Act and in the recently enacted antiterrorism legislation.

Attorney General Reno has also long been an advocate for treating victims with respect and dignity. While serving as State Attorney in Dade County, Florida, she supported amending the Florida Constitution to incorporate a victims' rights provision. During her confirmation hearings as Attorney General, it was noted that, while heading an office with hundreds of prosecutors in Florida, she took the time personally to counsel and provide emotional support to individual victims in her office's cases.

The President and Attorney General have come to support a constitutional amendment on the basis of personal experience and after very careful consideration of whether such an amendment is needed. In addition, extensive review and analysis took place within the White House and the Department of Justice. Along with the President, we at the Justice Department, as a result of this study, reached several important conclusions.

First, unless the Constitution is amended to reflect a commitment to the rights of victims, there will never be the level playing field for victims in our criminal justice system to which the President is committed. As the President stated on June 25:

> The only way to give victims equal and due consideration is to amend the Constitution. For nearly 20 years I have been involved in the fight for victims' rights since I was attorney general in my home state. . . . Over all those years, I learned what every victim of crime knows too well: As long as the rights of the accused are protected but the rights of victims are not, time and again, the victims will lose.
>
> When a judge balances defendants' rights in the Federal Constitution against victims' rights in a statute or a state constitution, the defendants' rights almost always prevail. That's just how the law works today. We want to level the playing field. . . . When a judge balances the rights of the accused and the rights of the victim, we want the rights of the victim to get equal weight.

It is important to note that we are not proposing that a victim's rights be given more weight than the rights of an accused; we are simply encouraging you to make sure they are given *equal* weight. For example, we have found that judges across the country routinely bar victims of violent crime from attending the trials of the individuals accused of committing those crimes because of the possibility that the victim might be called as a witness. If the victims had a constitutional right to attend, those judges would have to respect that right. We would have a level playing field where each interested party has rights included in the U.S. Constitution.

Second, it is clear that even a coordinated effort to secure victims' rights by other means inevitably would be fragmentary, uneven and inadequate for the foreseeable future. While the victims' rights movement has sought legal reforms promoting victims' rights at the state level for the past two decades, few states have passed laws that effectively provide for the full range of rights that we think are appropriate.

Even where states have passed strong victims' rights statutes or ratified victims' rights Constitutional amendments, their efforts have sometimes been undermined or nullified by judicial decisions. Courts may believe that victims' rights under state law are inconsistent with the state constitution. Even amending the state constitution to protect victims' rights only gets over one hurdle, as courts may hold that

these rights are trumped by the rights of the defendant under the federal Constitution. Thus, in a substantial class of cases, such rights of victims as the right to attend proceedings and the right to address the court concerning sentencing have been reduced to paper promises.

The President illustrated these points in his June 25 remarks:

> The wife of a murdered state trooper in Maryland is left crying outside the courtroom for the entire trial of her husband's killers, because the defense subpoenaed her as a witness just to keep her out, and never even called her. A rape victim in Florida isn't notified when her rapist is released on parole. He finds her and kills her.
>
> Last year in New Jersey, Jakiyah McClain was sexually assaulted and brutally murdered. She had gone to visit a friend and never came home. Police found her in the closet of an abandoned apartment; now, her mother wants to use a New Jersey law that gives the murder victims' survivors the right to address a jury deciding on the death penalty. She wants the jury to know more about this fine young girl than the crime scene reports. She wants them to know that Jakiyah was accepted into a school for gifted children the day before she died. But a New Jersey judge decided she can't testify even though the state law gave her the right to do so. He ruled that the defendant's constitutional right to a fair trial required him to strike [the] law down.

The New Jersey Supreme Court, on June 28, struck down this unfair lower court decision. But until the federal Constitution is amended, this same tragic series of events will continue to take place in other states. And regardless of the New Jersey Supreme Court decision, for the mother of Jakiyah McClain, there is no second chance to speak at the sentencing of her daughter's killer.

Third, it also became clear during our review of this issue that the rights that an amendment would secure for victims are the same type of rights that are secured for others elsewhere in the Constitution. The rights which the President believes should be protected by a constitutional amendment are primarily intended to guarantee the ability of victims to participate in proceedings related to crimes committed against them. These are the types of rights—the rights to *participate* in our democratic institutions—that the Constitution has historically been amended to ensure.

The First Amendment guarantees all Americans the opportunity to participate in the political and social discourse of the nation by protecting the rights of free speech, free press, peaceable assembly and petition for redress of grievances. The most fundamental participatory right in a democracy—the right to vote—has been the subject of no fewer than four constitutional amendments, which have extended that right to all adults regardless of race, gender, financial means or age.

In the criminal justice context, those accused of committing crimes have the right to be represented by counsel and the right to confront those witnesses who testify against them. The public and the community affected by an offense are afforded important participatory rights in the criminal justice system through the Constitution's public trial and jury trial guarantees. It is only the victims of the crime—those directly affected by the actions of the accused—who do not have specific constitutional rights during a trial.

As the President stated:

> Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be.

Fourth, we concluded that the protection of the rights of victims would not only be good for victims, it would also be good for law enforcement. The successful operation of the criminal justice system depends on the willingness of victims to report crimes, cooperate in investigations, and provide evidence at trial. If victims are treated with the respect they deserve and with an acknowledgement of their central place in any prosecution, they are likely to be more active and willing participants in the process.

Many of the rights in the various proposals before you offer specific benefits to law enforcement. If victims are *notified of proceedings* and *allowed to attend,* they will be better able to detect, and inform the prosecutor about, misrepresentations in testimony by the defendant and defense witnesses. Allowing victims *to be heard*

directly in pretrial release and sentencing proceedings increases the likelihood of balanced and appropriate decision-making by providing courts with relevant information and by impressing on courts that there is an actual human being who is being threatened by, or who has been harmed by, the defendant. It will undoubtedly make those decisions more acceptable to the victims and others as well. *Notice of release* of the defendant or offender enables the victim to take precautions which may prevent the commission of further crimes. *Restitution* furthers penal interests by impressing on the offender the harm he has caused by his criminal conduct and holding him financially accountable for that harm.

WHAT AN AMENDMENT SHOULD LOOK LIKE

As I stated earlier in my testimony, great care must be taken in drafting an amendment to ensure that we satisfy the goals of the amendment without any adverse effects on other parts of the criminal justice system. As the President has put it, "[w]e want to protect victims, not accidentally help criminals."

The President has made clear the rights that he feels should be included in such an amendment and has identified some of the pitfalls that concern him. At this point, rather than propose actual language, I would like to address central issues relating to the basic rights as originally identified in H.J. Res. 173 and also H.J. Res. 174. I should note that we have already shared some of our concerns with the Chairman, Senator Feinstein, Senator Kyl and others and are heartened by the discussions to date.

Right to Notice and Attendance. The President supports the right of victims to have notice of, and not to be excluded from, public court proceedings relating to the relevant case. This is, of course, the most basic right that should be accorded to victims of crime but, remarkably, is too often denied such victims. While our criminal justice system treats criminal activity as an assault on society at large, we cannot ignore the fact that the impact of those crimes on the victims is often devastating and is obviously greater than the more diffuse impact on society as a whole. We believe that victims deserve the right to be informed of and to not be excluded from attending public proceedings in which society seeks justice for the harm visited upon them.

It is important that this right be formulated as *a right not to be excluded from proceedings* rather than as a more vaguely worded attendance right. This would accomplish the essential objective of barring courts from excluding victims because they might be called as potential witnesses or for some other reason. It would avoid, however, adverse effects on law enforcement which might result from more ambiguous formulations. Specifically, a right "to attend" court proceedings could hinder successful prosecutions if courts interpreted such a provision as requiring that criminal proceedings be delayed for purposes of victim attendance. Likewise, resource and safety problems could result from a formulation that could be interpreted to require the government to transport victims to attend proceedings.

We believe it is also important that this right be defined as a right to attend *public* court proceedings. This will ensure notice and attendance rights for victims in the vast majority of cases. However, there are extremely limited circumstances in which criminal proceedings are closed to the public and in which confidentiality is essential. For example, consider a proceeding for judicial approval of the release from prison of a cooperating offender to act as a confidential informant. If the victim of the offender's crime is a member of a rival crime gang or even a friend of such a rival gang member, notifying that victim of the proceeding would jeopardize the contemplated use of the offender as an informant.

Right to be Heard. The President supports the right of victims to be heard by the trial court concerning the release of the accused, his or her sentence and acceptance of any negotiated plea, when the victim is present at the proceedings relating to those determinations. This right provides the most basic form of participation for crime victims. It is important, however, that this right is one to be *heard:* it provides a voice to victims on these matters, not a veto. The Department of Justice also feels it is important that such a provision be formulated as a right for victims to address the trial court concerning these determinations *if present* at the pertinent proceedings. Language characterizing allocution as a right for victims who are present at the proceedings currently appears in the sentencing allocution right for victims of violent crimes under Federal Rule of Criminal Procedure 32. Language of this type would prevent misinterpretations of the allocution right as requiring the delay of proceedings if a victim is not present or as creating affirmative obligations to transport victims for allocution purposes.

Rights Relating to Parole Hearings. The President supports similar rights of notice, attendance, and allocution for victims in parole hearings. Care should be taken

in formulating these rights to make it clear that their scope of application is parole hearings. Prison management and security problems could result from ambiguous formulations that might be interpreted as requiring notice, attendance, and allocution rights in relation to non-parole prison disciplinary proceedings which may have some effect on the date of release.

Right of Notice of Release. The President also supports the right of crime victims to be given notice of release or escape from custody of the accused or convicted offender. Victims of violent crimes often live in fear of perpetrators seeking revenge after their release. A right to notice of such release—or escape—ought to be part of this Constitutional amendment, although again we must be mindful of possible unintended consequences on law enforcement.

Right to Restitution. The President also supports ensuring victims the right to appropriate restitution from the convicted offender. We all agree that an individual convicted of a crime should be held responsible for the harm he has caused his victims. Given the costs and burdens involved in the victims bringing their own separate civil suits, the practical choice is usually between awarding restitution as part of the criminal proceedings or not realistically providing the victim with any possibility of receiving compensation from the offender. Thus, restitution should be an important element of any amendment.

Right to Protection from the Defendant. President Clinton believes an amendment should include the right of victims to reasonable protection through the imposition of reasonable confinement release on the accused or convicted offender. We need to be careful that broader formulations of victims' rights not amount to empty promises or impose unreasonable burdens.

Right to Notice of Rights. People cannot exercise rights if they do not know what they are. It is accordingly appropriate and important, as the President has indicated, to include in a constitutional victims' rights amendment a requirement that victims be given notice of the rights secured by the amendment.

Remedies. As I stated at the beginning of my testimony, a crime victims amendment must be more than a symbol. It must provide for rights that are enforceable. Accordingly, the President has made it clear that any amendment should be self-executing, so as to take effect as soon as it is ratified without the need for additional legislation. Thus, it must create rights rather than simply empower Congress and the states to enact legislation.

The rights contained in an amendment should also be enforceable in the courts just as other constitutional rights are enforced. These rights should be enforceable through injunctive and declaratory relief and other appropriate means that Congress or the states devise.

However, the President believes that a constitutional amendment not provide victims with a cause of action for damages against government officials or entities responsible for securing these rights. Victims and their advocates are not in this for money, but for justice. It is also important that the amendment not provide a basis for anyone other than the government to challenge a conviction or a sentence. The purpose of an amendment is to improve the criminal justice system for those who have suffered at the hands of criminals and not to provide new loopholes for criminals to exploit.

Finally, some of the proposals include the right to a reasonably prompt trial and to the timely conclusion of proceedings. There is no question that prolonged proceedings often compound the suffering of victims. That suffering can be greatly increased when prosecutors and others refuse to explain the cause of the delays. However, there are times when delays cannot be avoided or when such delays actually serve the interests of justice and, ultimately, the victims in criminal proceedings. For example, government attorneys may seek delays to ensure time for the adequate investigation of the crimes or for trial preparation, to seek interlocutory appeals of adverse pre-trial rulings, or to try first related charges brought against a defendant's accomplices. A particularly complex case such as the World Trade Center bombing prosecution may require substantially more time to investigate and prepare than other cases. While such efforts might be considered "reasonable" or "timely" under these formulations, we are concerned that such a provision not take these basic law enforcement and prosecutorial judgments away from law enforcement officials. As I have previously stated, we are open to further discussions on the matter to see if there is a formulation that alleviates our concerns while still granting meaningful rights to victims of violent crime.

Mr. Chairman, through your personal efforts and those of your counterparts in the Senate, we now have an opportunity to establish a national baseline of fundamental rights for victims of violent crime through amendment of the Constitution. We look forward to working with you in drafting an amendment that will realize the rights of crime victims as effectively as possible, while avoiding any unintended

adverse effects. In addition, the Attorney General is particularly concerned that there be adequate resources provided to States and the federal Government to ensure that they can provide these rights to victims in a meaningful way.

We stand at the threshold of an historic reform which will correct and enrich our fundamental law to the benefit of the victims of crime and all Americans. With the continued spirit of bipartisan cooperation and serious purpose that has characterized this amendment process, I have no doubt that we will succeed. In closing, I can do no better than to note the President's final remarks in his address on this issue:

> Two hundred twenty years ago, our Founding Fathers were concerned, justifiably, that government never . . . trample on the rights of people just because they are accused of a crime. Today, it's time for us to make sure that while we continue to protect the rights of the accused, government does not trample on the rights of the victims.
>
> Until these rights are also enshrined in our Constitution, the people who have been hurt most by crime will continue to be denied equal justice under law. That's what this country is really all about—equal justice under law. And crime victims deserve that as much as any group of citizens in the United States ever will.

I would be pleased to answer any questions the Committee may have.

Mr. HYDE. Thank you very much, Mr. Schmidt. Your testimony has been very helpful. Your staff has been very helpful too. They were over yesterday briefing us on your remarks and your position. I am confident that our staff and minority staff and your office, working with outside organizations like the National Association of Attorneys General and district attorneys who have some input, we can come up with the language, a formulation that isn't overkill, but raises to the dignity of the Constitution, the important rights of the victim and not let them be superseded by those of the accused.

Mr. Conyers.

Mr. CONYERS. Thank you. Welcome, Mr. Assistant Attorney General. I am delighted to have you here. Our staff has been working with your people. We'll keep our fingers crossed.

I have got questions that I am going to send you. Perhaps we will be able to sit down as this product takes more definitive shape.

Do you see much difference between 173 and 174?

Mr. SCHMIDT. I think there are some differences. As I indicated, the President has not endorsed either one. Indeed, there are already further versions of the initial Kyl Feinstein version, which Chairman Hyde also introduced into the House. So there are some differences. But rather than deal with the differences between those two, I think what is more important is to try to get to something that is better than either one and can achieve a degree of consensus on the part of everybody who is involved in this process.

Mr. CONYERS. Thank you very much.

Mr. HYDE. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Schmidt, I am a little confused as to exactly what you want done that can't be done by statute. You talked about a patchwork. A Federal statute would be a consistent measure. We could do that quickly, have it over with, and not have to fool with a constitutional amendment and all the problems that would come about, as you are well aware.

Mr. SCHMIDT. Well, I don't think there's any way a Federal statute could deal with the issue as it relates to State criminal proceedings, which is probably the most serious issue. I wouldn't want to

claim the Federal system is perfect, but, if anything, it's a step ahead of where the States are.

Mr. SCOTT. If you can condition some sufficient funding on complying with the Federal statute.

Mr. SCHMIDT. You could conceivably start saying that Byrne money or something will be conditional upon passing statutes. That will never get you consistency. It will get you a somewhat better patchwork I would say.

Mr. SCOTT. What are you trying to get done that can't be done by statute?

Mr. SCHMIDT. Achieve a consistent national recognition in every proceeding, State and Federal, involving crimes of violence of certain basic rights of victims. I don't think there's any conceivable way a statute is going to get you there.

Mr. SCOTT. What are you trying to get done? What is being done now that you want to change?

Mr. SCHMIDT. We want to provide notice to victims of court proceedings, which is not done consistently around the country.

Mr. SCOTT. Stop right there.

Mr. SCHMIDT. OK.

Mr. SCOTT. Can we do that by statute?

Mr. SCHMIDT. Not by Federal statute, no. There is no way the Federal Government could pass a statute and mandate that States give notice to victims in criminal proceedings around the country.

Prior to the *Lopez* decision, we might have gone a long way with an expansive view of Federal commerce power, but even that wouldn't get us all the way. Today it wouldn't get us anywhere close, because there would be a whole range of State criminal proceedings that would be beyond the reach of the Federal statute.

Mr. SCOTT. OK. You are saying you can not do that by statute?

Mr. SCHMIDT. Not by Federal statute.

Mr. SCOTT. OK. You mentioned the question of defendants' rights and victims' rights. If the defendants' rights are jeopardized, we need a constitutional amendment to even it so the—are you suggesting that a constitutional amendment would jeopardize defendants' rights as they are now in the Constitution?

Mr. SCHMIDT. No. I do not think it would. I think the only circumstance where it would come into play that would affect defendants' rights would be in a case, which I think is rare, where there is some at least potential conflict between the assertion of a victim's right and the assertion of a defendant's right. If, in those circumstances, the victim's right is put into the Constitution, then the court would be required to balance those two rights.

Mr. SCOTT. And jeopardize a defendant's rights?

Mr. SCHMIDT. In the vast majority of circumstances, I think it's possible to achieve a result that doesn't require any ultimate deprivation of defendant's rights.

Mr. SCOTT. OK. What kind of remedies would you suggest for violation of the constitutional amendment?

Mr. SCHMIDT. I think the victims themselves need to have the right to seek redress in court. They would have an enforceable right in the court that is handling the proceeding. I think that declaratory and injunctive relief would be available under Federal statutes that guarantee constitutional rights.

I think the primary things that we would exclude, that the President said he would exclude, would be monetary damage actions, which I don't think we need and I think would be a mistake, and we would also exclude any ability to reverse convictions, etc. But the whole range of nonmonetary relief that's currently available for violation of Federal civil rights would be available for violation of these constitutional rights.

Mr. SCOTT. Injunction? So suppose you have a plea bargain going forward without notification. What happens?

Mr. SCHMIDT. There would be no capacity to hold up the proceeding. I think that the victim, however, could go into court and assert his or her right to be heard. If the court were to refuse to allow that, they would have a right of appeal. I think if a State court system were to systematically refuse to give notice to victims or they didn't even hear about it and they couldn't assert those rights, you could go in for declaratory injunctive relief.

Mr. SCOTT. The victim could come in and get an injunction about their participation level in a pending case?

Mr. SCHMIDT. I think if you took a case where a court was deliberately refusing to allow a victim to be heard, I think a victim could probably seek some sort of emergency relief to mandamus or direct the judge to grant that relief.

I think the more common situation though in States that have had victims' rights amendments is some form of more general declaratory or injunctive relief, where if a court system is systematically refusing to give notice, they would be directed to do so in a court action brought by victims or by victims' advocates.

Mr. SCOTT. And do you have a definition of victim?

Mr. SCHMIDT. I think there are definitions that exist under various Federal statutes. The versions of the amendment in their current form would leave the precise definition to implementing legislation, to the extent you needed to go beyond the basic elements.

I think for most purposes today, it is defined as a person who is the subject of the crime, or in the case of murder, other family members. But it comes up in various contexts. There are definitions that exist.

Mr. SCOTT. Without a definition in the constitutional amendment itself, you could not limit its application by statute.

Mr. SCHMIDT. No. I think the constitutional amendment would be self-enforcing, to the extent that the definition has certain obvious characteristics. But I think that to the extent Congress or the States chose to do so, they might refine the definition of a victim in the implementing legislation. I think they might have that capacity.

There is an enforcement power comparable to what exists today under the 14th amendment to implement the 14th amendment that would allow Congress in the case of Federal crimes or the States with respect to State crimes to go further in refining or defining those terms.

Mr. HYDE. The Chair notes the gentleman's time has expired. However, it would be my suggestion, Mr. Scott, you have had a series of important questions, that maybe you do what Mr. Conyers is going to do, write Mr. Schmidt and get some answers which you

could share with us. That would be helpful, if you don't mind. Unless you want additional time. Do you?

Mr. SCOTT. Just one more question.

Mr. HYDE. Surely.

Mr. SCOTT. You have suggested some reservations about the two resolutions we have before us. Would it be your suggestion that we not go forward until we get this straight, resolve some of the questions that you have and problems that you have with the pending legislation before us?

Mr. HYDE. If I could intervene. We don't intend to go forward until we have exhausted our negotiations with the Justice Department and with the Senators and everybody, because we want a product that will sell.

Well, you too, you're an important player, Mr. Scott. You are.

Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I understand, Mr. Schmidt, that you and the administration and some other politicians and some members of the public think that this is important, but I am not sure I understand why it's important for us to do it at the Federal level at this point.

There are a number of States, we've heard testimony today, approximately 20 which have passed these victims' rights statutes, mostly fairly recently. Some other States are on the verge of passing them, such as North Carolina, I understand. Quite often, we allow the States to be the laboratories for determining whether things work or do not work, the cost, additional cost that is engendered as a result of having victims object to plea bargains and what have you, that might result in additional trial costs, additional necessity for judges.

I guess the question I'm asking is, why is this absolutely imperative right here right now from the Federal—I mean, 6 months ago, I hadn't heard anything about this. Actually, I started reading about the President being in support of it about a month ago.

What is it that is impelling this urgency about amending the Constitution of the United States?

Mr. SCHMIDT. Well I think to a very large extent the timing is being driven by the victims' advocacy organizations, who have been working in this area now for a long while, and as you say, have been successful in some States in passing State constitutional amendments. I think some 20 States have State constitutional amendments. Even more have statutes of some sort.

I think one should note that this is totally nonpartisan, nonideological; it cuts across every conceivable line in terms of its political spectrum. There is a whole network of groups that advocate on behalf of victims' rights, ranging from Mothers Against Drunk Driving to a whole substantial number of groups that advocate on behalf of victims of domestic violence and so forth. They came together really late last year and early this year and concluded that they had reached a point in this process where it was clear that the patchwork, if I can call it that, of State constitutional amendments and statutes was not going to get us where they believe and where I believe we need to go. That is a reasonable consistent recognition of why now rather than 6 months from now or a year from now. You reach a point, and people reach a point in the process,

where they say we're not going to get there any other way, and there's enough of a critical mass of support to think it's realistic to go forward.

Mr. WATT. To my knowledge or to your knowledge, has any kind of projection of increased cost and increased burden on the incarceration system that might be associated with not letting people out because victims object to their bond hearings or parole or has anybody done any of those kinds of projections to try to figure out what kind of additional burden we are planning to impose on the system?

Mr. SCHMIDT. Well, we have at the Justice Department been trying to look at what the costs would be. Although the costs that you are referring to, that somehow this amendment would result in keeping people in jail longer because victims object, I would have to say if that actually happened, if victims being heard resulted in different decisions as a result of judges hearing what victims have to say, that would seem to me to be a cost that we would want to pay.

Mr. WATT. Well it might and it might not, I mean, you know, it depends. But it seems to me, we ought to at least know what the monetary impact is before we impose this additional cost on the public. We have some laboratories out there that will allow us to make that kind of determination if we were inclined to take the time to do it.

Let me ask one more question. I see my time is up, Mr. Chairman.

Mr. HYDE. Surely.

Mr. WATT. Given all of this urgency, I am just astonished that the attorney general and the administration haven't already issued a set of guidelines to every district attorney around the country, that at least guarantees victims these rights in the Federal courts. Has the administration done any of that?

Mr. SCHMIDT. There are Attorney General guidelines for victim rights and victim protection which I think come very close to guaranteeing what is in this Federal constitutional amendment within the Federal system. It would not be precisely there, and indeed——

Mr. WATT. So we don't need this for the Federal?

Mr. SCHMIDT. Well, one of the things we are looking at currently is whether we need to strengthen those guidelines. There's a Federal statute that deals with victims' rights in the Federal system. It guarantees various of these rights, but puts it in terms of using our "best efforts" to achieve them.

One of the things we are actually looking at is whether that statute, independent of the constitutional amendment process, should be strengthened to eliminate the "best efforts" law gauge and say flatly these rights shall be recognized.

Mr. WATT. But all of a sudden all this discretion that we said that we were giving to the States and because they were such reasonable people and could exercise the level of judgment that they needed to exercise, independent of our directing them, we're going to go on the other side of the fence on that now?

Mr. SCHMIDT. Well, to the extent a constitutional amendment is passed, of course, three-quarters of the States will have to have ratified it. So I do not think it's a question of directing the States,

so much as it's a matter of the States and the Federal Government through the amendment process coming to the conclusion that here's something that we are all prepared to do.

Mr. WATT. Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Watt.

Well, thank you, Mr. Schmidt. In computing the additional cost burden that this constitutional amendment might impose on our structure, you might compare it to the cost burden of dealing with the jailhouse lawyer suits that proliferate like a snowstorm, and the habeas appeals that are endless, et cetera, et cetera. So it costs a lot to have justice. A little justice for the victims to offset some of the expenditures for the accused or the convicted doesn't seem to me to be an unhealthy thing.

In any event, we thank you for your testimony. We'll continue to work with you and with our colleagues to come up with a formulation that as I say, is precisely what we want. Thank you.

Mr. SCHMIDT. Thank you.

Mr. HYDE. The committee is adjourned.

[Whereupon, at 3:53 p.m., the committee adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

STATEMENT OF SENATOR JON KYL VICTIMS' RIGHTS AMENDMENT BEFORE THE HOUSE JUDICIARY COMMITTEE 11 JULY 1996

I. Introduction

I would like to thank Chairman Henry Hyde for holding this hearing, for his work on this issue, and for his strong testimony in April at the Senate Judiciary Committee's hearing on the victims' rights amendment. I would also like to thank Senator Dianne Feinstein for her efforts to advance the cause of victims' rights and for her hard -- and very valuable -- work on the language of this amendment.

II. Need to protect victims' rights -- scales of justice imbalanced

The scales of justice imbalanced The U.S. Constitution grants those accused of crime many constitutional rights. For example:

* the right to a speedy trial
* the right to a jury trial
* the right to counsel
* the right against self-incrimination
* the right to be free from unreasonable searches and seizures
* the right to subpoena witnesses
* the right to confront witnesses, and
* the right to due process under the law.

The Constitution, however, guarantees no rights to crime victims Victims have

* No right to be present
* No right to be informed of hearings
* No right to be heard at sentencing or at a parole hearing
* No right to insist on reasonable conditions of release to protect the victim
* No right to restitution
* No right to challenge unending delays in the disposition of their case
* No right to be told if their attacker escapes.

This lack of rights for crime victims has caused many victims and their families to suffer twice, once at the hands of the criminal, and again at the hands of our justice system

Victims and their families are often treated as inconveniences, ignored throughout the trial proceedings.

III. Pollard case

Consider the case of Patricia Pollard -- a woman from my home state of Arizona

In July of 1974, on a road just outside of Flagstaff, Arizona, Patricia Pollard was silenced -- first by an attacker, and then by the judicial system.

Eric Mageary used the jagged edge of a ripped beer can to inflict deep slash wounds in her body He broke her ribs and her jaw. He choked her into unconsciousness and left her for dead by the side of the road

Patricia survived Mageary was convicted and sent to prison Ten years short of serving his *minimum* sentence, he was paroled.

No notice was given to Patricia. If given the opportunity, Patricia would have wanted to tell the judge about the crime, about how dangerous Mageary was, and how a long prison sentence was needed to protect the community from this vicious criminal But the law gave Patricia no right to be heard, and society paid for its silencing of her. Mageary's parole was soon revoked for serious narcotics violations, and he was back in prison.

In 1990, the people of Arizona amended their state constitution to add a Victims' Bill of Rights, which established the right of victims to be informed, present, and heard at every critical stage in their case

Incredibly, in 1993, in direct violation of Patricia's new constitutional rights, the parole board voted to release Mageary -- again without hearing from Patricia

But this time there was a remedy for this injustice. An action was filed to stop the release and force the board to hold another hearing in which Patricia's rights would be protected The Arizona Court of Appeals acted swiftly and stopped the release The second time around, after the board took the time to hear directly about the horrible nature of the crime, they voted for public safety and for Patricia, and kept Mageary behind bars. Without constitutional rights for Patricia, the safety of the community would have been jeopardized again.

Constitutional rights restored Patricia's voice Not all Americans have these rights, and even those that exist are not protected by the supreme law of the land, the U.S. Constitution. That is why we have introduced a Victims' Bill of Rights to the U.S. Constitution to extend to victims throughout the country a threshold of basic fairness. Victims must be given a voice -- not a veto, but a real opportunity to stand and speak for justice and the law-abiding in our communities

IV. Intent of constitutional amendment

The *criminal* justice system is -- as the name implies -- focused on the *criminal*, not the victim. The system is set up to bend over backwards for the defendant The system is governed

by the notion that it is better to let 9 guilty people go free rather than imprisoning 1 innocent person.

But when it comes to victims, the system looks the other way.

The intent of the victims' rights amendment is to right the balance -- to ensure that we have a new definition of justice . . . one that includes the victim.

State constitutional amendments and federal statutes to protect the rights of victims are not enough Until victims' are protected by the United States Constitution, the rights of victims will be subordinate to the rights of the defendant

V. Victims need rights in the federal constitution

(A) If the reform is to be meaningful, it must be in the U.S. Constitution

Some may say, "I'm all for victims' rights but they don't need to be in the U.S Constitution The Constitution is too hard to change. All we need to do is pass some good statutes to make sure that victims are treated fairly."

But statutes have not worked to restore balance and fairness for victims The history of our country teaches us that constitutional protections are needed to protect the basic rights of the people.

Who would be comfortable now if the right to free speech, or a free press, or to peaceably assemble, or any of our other rights were subject to the whims of changing legislative or court majorities?

When the rights to vote were extended to all regardless of race, and to women, were they simply put into a statute?

Who would dare stand before a crowd of people anywhere in our country and say that a defendant's rights to a lawyer, a speedy public trial, due process, to be informed of the charges, to confront witnesses, to remain silent, or any of the other constitutional protections are important, but don't need to be in the Constitution?

Such a position would be rightly subject to ridicule. Yet that is precisely what critics of the Victims' Bill of Rights would tell crime victims. Victims of crime will never be treated fairly by a system that permits the defendant's constitutional rights always to trump the protections given to victims Such a system forever would make victims second-class citizens. It is precisely because the Constitution is hard to change that basic rights for victims need to be protected in it

Our criminal justice system needs the kind of fundamental reform that can only be accomplished through changes in our fundamental law -- the Constitution

(B) When a conflict occurs, the defendant wins

Consider the following two examples:

1. *State ex rel. Romley v. Superior Court*, **836 P.2d 445, 453 (1992) (Arizona):** the defendant was charged after allegedly knifing her husband in a fight. The defendant then moved to require disclosure of the victim's medical records. Although the court agreed that the victim is entitled to refuse such a request under Arizona's Victims' Bill of Rights, it stated that such a refusal may nevertheless violate the defendant's due process right to a fundamentally fair trial The court held that when the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights, the due process is the superior right, and the due process clause of the U.S Constitution prevails over the provision in the state Constitution.

2. *Johnson v. Texas Department of Criminal Justice*, **910 F.Supp. 1208 (W.D. Texas, 1995)**, on appeal to the Fifth Circuit, in which the district court found that victims' "protest" letters in parole proceedings were precluded by the equal protection clause of the 14th amendment

Consider also the treatment of victims in the following cases

3. Florida Juvenile Court (1995): Two individuals were sentenced for crimes concerning the murder of a 15-year-old child The defendants were part of a gang of youths who beat and shot the victim to death In spite of the notoriety which the case received in the community and the presence of Florida statutes to the contrary, the parents of the murdered child were not notified about and did not attend the sentencing of two of the defendants involved in their son's murder

4. People vs. Castaway (Colorado): In this recent murder case, the victim's mother was subpoenaed and effectively kept out of the courtroom due to a sequestration order She was never called to testify The prosecutors never once asked that she be permitted to stay in the courtroom

VI. Cost

The experience in Arizona is that the costs are modest. For example, the cost of mailing notices to victims of various proceedings was less per year than the cost of one entry-level prosecutor

Surely this is not to high a price to ensure basic justice for crime victims

VII. Text

Before the amendment was introduced, the text was redrafted many times In April, Senator Feinstein and I -- and Chairman Hyde -- introduced the amendment, knowing that the language would need to be continue to be reworked In the last few months, Senator Feinstein and I have worked closely with such diverse scholars as Professors Larry Tribe and Paul Cassell

We have also worked with the Department of Justice, law enforcement, the major victims' rights groups And we have worked with Senator Hatch and, of course, Chairman Hyde

The introduced version -- and the most recent draft -- contain the rights that we believe victims should have

- The right to be informed of the proceedings
- The right to be heard
- The right to be notified of the offender's release or escape
- The right to a final disposition free from unreasonable delay
- The right to full restitution
- The right to reasonable conditions of confinement or release to protect the victim from violence or intimidation
- And the right of victims to be notified of their rights

The language describing these rights has changed -- and I continue to welcome suggestions on ways to improve the language But it is clear that these rights are necessary They are the core of the amendment. I believe that we are close to a version that can be voted on by the House and Senate.

The present language for each of these clauses is as follows

- **Informed:** "To be informed of and not to be excluded from any proceeding involving a release from custody or any public proceeding in which those rights are extended to the accused or convicted offender "
- **Heard:** "To be given the opportunity to be heard if present, or to submit a statement, at any proceeding involving a release from custody or sentencing, including the right to be heard regarding a previously negotiated plea"
- **Notified of release or escape:** "To be informed of any release or escape"

- **Timely disposition:** "To a final disposition free from unreasonable delay"
- **Restitution:** "To an order of full restitution from the convicted offender"
- **Protection:** "To reasonable conditions of confinement or release for the accused or convicted offender"
- **Notice:** "To notice of their rights"

Again, I would like to thank Chairman Henry Hyde for holding these hearings and allowing me to testify

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UN TED STATES
United States Post Office & Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Honorable Joseph Anderson
Honorable Richard J Arcara
Honorable Richard H Baney
Honorable Thomas R. Brett
Honorable Morton A Brody
Honorable Charles R Butler, Jr.
Honorable J Phil Gilbert
Honorable George P. Kazen
Honorable David D Noce
Honorable Gerald E. Rosen
Honorable Stephen V Wilson

(201) 645-2133

FACSIMILE

(201) 645-6628

Honorable Marvanne Trump Barry
Chair

July 17, 1996

Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Victims of Crime Constitutional Amendment

Dear Chairman Hyde:

Enclosed is a letter I sent yesterday to Senator Joseph R. Biden, Jr. in response to his request for the views of the Committee on Criminal Law of the Judicial Conference of the United States regarding the proposed "Victims of Crime Constitutional Amendment." The letter specifically comments upon S.J. Res. 52. However, in view of the similarities between that proposal and the two versions of this amendment introduced by you earlier this year, H.J. Res. 173 and H.J. Res. 174, it appeared that many of our comments might be of use to you and the members of the House Judiciary Committee, as well.

While the Conference has taken no position on this amendment, there are several aspects of these proposals that the Committee encourages Congress to carefully review prior to any final action. As our letter sets forth, the most careful review is essential because, as a modification to the nation's fundamental criminal law, the amendment has potential implications of a substantial magnitude.

If you have any questions regarding the matters discussed in the enclosed letter, please do not hesitate to contact me. I may be reached at 201/645-2133. If you prefer, please have your staff contact Dan Cunningham, Legislative Counsel at the Administrative Office of the U.S. Courts. Dan may be reached at 202/273-1120.

Sincerely,

Maryanne Trump Barry

Maryanne Trump Barry
United States District Judge
Chair, Committee on Criminal Law

Enclosure

cc: Honorable Carlos J. Moorhead
Honorable F. James Sensenbrenner, Jr.
Honorable Bill McCollum
Honorable Geroge W. Gekas
Honorable Howard Coble
Honorable Lamar S. Smith
Honorable Steven Schiff
Honorable Elton Gallegly
Honorable Charles T. Canady
Honorable Bob Inglis
Honorable Bob Goodlatte
Honorable Stephen E. Buyer
Honorable Martin R. Hoke
Honorable Sonny Bono
Honorable Fred Heineman
Honorable Ed Bryant
Honorable Steve Chabot
Honorable Michael Patrick Flanagan
Honorable Bob Barr
Honorable John Conyers, Jr.
Honorable Patricia Schroeder
Honorable Barney Frank
Honorable Charles E. Schumer
Honorable Howard L. Berman
Honorable Rick Boucher
Honorable John Bryant
Honorable Jack Reed
Honorable Jerrold Nadler
Honorable Robert C. Scott
Honorable Melvin L. Watt
Honorable Xavier Becerra
Honorable Zoe Lofgren
Honorable Sheila Jackson Lee
Honorable Maxine Waters

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States Post Office & Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Honorable Joseph Anderson
Honorable Richard J. Arcara
Honorable Richard H. Battey
Honorable Thomas R. Brett
Honorable Morton A. Brody
Honorable Charles R. Butler, Jr.
Honorable J. Phil Gilbert
Honorable George P. Kazen
Honorable David D. Noce
Honorable Gerald E. Rosen
Honorable Stephen V. Wilson

(201) 645-2133

FACSIMILE

(201) 645-6628

Honorable Maryanne Trump Barry
Chair

July 16, 1996

Honorable Joseph R. Biden, Jr
Ranking Member
Committee on the Judiciary
United States Senate
SD-148 Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. J. Res. 52, the Victims of Crime Constitutional Amendment

Dear Senator Biden:

You have expressed interest in the views of the Committee on Criminal Law of the Judicial Conference of the United States regarding S. J. Res. 52, the proposed "Victims of Crime Constitutional Amendment." As Chair of the Committee, I write to thank you for the opportunity to comment upon this proposal.

We in the judiciary recognize that the weighty decision to amend the Constitution is a policy matter of surpassing importance which must be made by Congress and the states alone. Article V of our Constitution makes no provision for the federal courts in this endeavor. However, federal judges do have a unique perspective that stems from the application of the nation's laws in our courtrooms every day. It is our hope that the observations we offer here will be of use to you and the other members of the Senate Judiciary Committee as you consider the proposed amendment.

While the Conference has taken no position on S. J. Res. 52, there are several aspects of the amendment that the Committee encourages Congress to carefully review prior to any final

action The most careful review is essential because, as a modification to the nation's fundamental criminal law, the amendment has potential implications of a substantial magnitude

If enacted, the amendment would represent a significant change in our criminal justice system, literally re-aligning the interests of defendants and victims, as well as the process by which criminal cases are adjudicated. Unlike the rights and protections afforded to citizens under the Constitution, which were largely part of the fabric of the law well-known and understood by the Founding Fathers, many of the concepts embodied in this amendment are wholly untried and untested, at least in the federal system, and will inevitably take years, if not decades, to evolve into a settled body of law and judicial administration Indeed, it is partly this uncertainty that motivates us to urge Congress to consider, at least initially, promulgating these rights statutorily, as discussed below.

Although some ambiguity in an amendment such as this is most probably unavoidable, this proposed amendment contains a significant number of provisions that raise fundamental issues of interpretation that will be extremely difficult for both federal and state courts A few examples, essentially by way of questions, will illustrate the point.

While the amendment confers upon a "victim" a host of rights and protections, it provides no definition for the term "victim." If a defendant is charged with distributing crack cocaine in a housing project, are all residents "victims?" If the crime is public corruption, are all citizens "victims?" In the case of a corporate polluter guilty of discharging toxic chemicals into the air in a large metropolitan city, who constitutes a "victim?" In the case of a murder, does "victim" include an aunt of the deceased? Would it include the deceased's life insurance company? It is important to note that this issue is not merely rhetorical, as the amendment provides Congress and the states with the authority to define any crime as coming within its terms Additionally, the current wording of the amendment automatically includes a "crime of violence" but does not define that term, which has more than one meaning under federal law

Since the amendment, by its own terms, applies "throughout the criminal, military, and juvenile justice processes," does the victim's right "to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender" apply to prison administrative disciplinary proceedings concerning the revocation of an inmate's outdoor exercise privileges? If the victim resides far from the forum in which the case is heard, what is a court's obligation to coordinate its hearing schedule with the victim's availability? Indeed, if the victim has a constitutional right to be present at each such proceeding, what obligation has the government to provide transportation to an indigent victim?

Is the victim's "right to object to a previously negotiated plea" binding upon the court? Is it merely advisory?

How can courts enforce the victim's right to a speedy trial? Under the current Speedy Trial Act, 18 U.S.C. §§ 3161 - 3174, an unwarranted delay can result in dismissal of the charges If this amendment is adopted, and a future trial is not speedy, what relief would the victim receive? A new trial? An interim appeal? Could a victim file a motion to enjoin further evidence gathering and force the trial to begin? Would this mean forcing prosecutors to begin trying cases before they have completed their investigations?

Does a victim's right to a "final conclusion free from unreasonable delay" conflict with a defendant's right to file a motion under 28 U.S.C. § 2255 or a habeas corpus petition? What would be the effect of a case such as United States v Bailey, ____ U.S. ____, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), which overturned the convictions of persons convicted under an erroneous interpretation of the law? If this proposed amendment is enacted, would all previously-convicted defendants be barred from invoking their rights to challenge their convictions because of a countervailing right to a "final conclusion?"

Does the mandatory restitution clause contained in the amendment supersede the mandatory restitution requirements recently enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214? Is the right absolute in all cases, unlike current mandatory restitution provisions? How should courts interpret this clause in cases in which the defendant is indigent?

How quickly after a crime does the victim's right to "notice of the victim's rights" attach? Since the amendment applies, by its own terms, "from the occurrence" of the crime and "throughout" all the proceedings, is someone in the criminal justice system responsible from the moment the crime is committed not only to identify but to contact all victims? Who would be responsible for performing this function? Law enforcement agencies? United States Marshals? Magistrate Judges? What are the rights of a victim who appears at a later stage of the proceedings and protests lack of earlier notification? What would the effect be on the proceedings already concluded by that time?

Although alluded to at several points previously in this letter, the issue of victim enforcement of the rights contained in the amendment is perplexing. If a victim believes that his or her rights are being compromised in a case, can the victim appeal immediately, or would the victim be required to wait until the end of the trial? At that point, what relief would the victim seek? What are the double jeopardy implications? Which of the many possible violations of the new constitutional rights will give rise to an action under 42 U.S.C. § 1983, a Bivens action, or any other damage suit against the federal or state governments, their agents and employees?

The questions raised here give some idea of the substantial implications the amendment would have for the courts; indeed, the terms of the amendment raise a panoply of issues which will almost certainly result in years of vexing, difficult litigation. Moreover, the issues raised here

do not explore the perplexing issues presented by the amendment to law enforcement and other governmental agencies

In light of the serious questions raised, we urge that Congress approach the consideration of this amendment with utmost prudence and caution. Such sweeping changes in our criminal justice system should not be accorded anything less than thorough, exhaustive deliberation. As part of this process, it should be noted that virtually any or all of the rights enumerated in this amendment could be applied to the federal system by means of a statute. Indeed, Congress has already provided for certain victim rights under current law. *See, e.g.*, 42 U.S.C. § 10606 (1995) (passed as part of the Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended in scattered sections of 42 U.S.C.)). *See also* Fed. R. Crim. P. 32(c)(3)(E), (f). Congress may wish to seriously consider initially promulgating these rights statutorily as opposed to taking immediate action by amending the Constitution. For example, Congress might wish to strengthen the provisions contained under 42 U.S.C. § 10606 (a). A prudent step such as this would much more easily accommodate any "fine tuning" deemed necessary or desirable by Congress. It would also allow the federal courts to gain some experience with the rights and principles embodied in this amendment prior to the incorporation of these rights and principles into our nation's fundamental legal document and their concomitant application to the state systems.

Once again, I thank you, on behalf of the Committee, for the opportunity to share with you these observations regarding this amendment. If you have any questions regarding the matters discussed herein, please do not hesitate to contact me. I may be reached at 201/645-2133. If you prefer, please have your staff contact Dan Cunningham, Legislative Counsel at the Administrative Office of the U.S. Courts. Dan may be reached at 202/273-1120.

Sincerely,

Maryanne Trump Barry

Maryanne Trump Barry
United States District Judge
Chair, Committee on Criminal Law

cc Honorable Orrin G Hatch, Chair
Honorable Strom Thurmond
Honorable Alan K. Simpson
Honorable Charles E. Grassley
Honorable Arlen Spector
Honorable Hank Brown
Honorable Fred Thompson
Honorable John Kyl
Honorable Mike DeWine
Honorable Spencer Abraham
Honorable Edward M Kennedy
Honorable Patrick J Leahy
Honorable Howell Heflin
Honorable Paul Simon
Honorable Herb Kohl
Honorable Dianne Feinstein
Honorable Russell D. Feingold

STATEMENT

of

Roger Pilon, Ph.D., J.D.
Senior Fellow and Director
Center for Constitutional Studies
Cato Institute
Washington, D.C.

before the

Judiciary Committee
United States House of Representatives

July 11, 1996

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am a senior fellow at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to begin by thanking the committee for inviting me to testify on H.J. Res. 174, a proposed constitutional amendment to protect the rights of victims of crime. I am especially grateful that you have allowed me to submit a written statement in lieu of oral testimony as I have been unable to adjust my schedule to appear in person.

Although I am opposed to the proposed amendment, I want to make it very clear at the outset that I am in complete agreement with its larger aims.[1] We need to do far more than we have traditionally done in this Nation to help the victims of crime. For both constitutional and practical reasons, however, this amendment is not the best way to accomplish those ends.

Amending the Constitution is a serious matter. Clearly, the provisions of Article V that enable us to do so were put there to be used. But just as clearly, experience has taught us that those provisions are to be used only when circumstances plainly warrant

---

[1] In fact, just to be perfectly clear on that, one of my earliest professional articles, written nearly 20 years ago, was a piece lamenting that the crime victim was the forgotten person in our criminal justice system and arguing, among other things, that the victim should have the first cut at the criminal, through a system of victim restitution, the state or public the second cut, through a system of punishment. See Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" 88 Ethics 348 (1978).

it. When other, more flexible means are available to accomplish desired ends--especially when those means may need to be refined in light of experience--prudence alone suggests that we not lock such means in our basic law, the Constitution.

In the case at hand, state and local governments have been moving for some time to better provide for the victims of crime. And at the federal level, every aim of this amendment can be accomplished--with equal effect and greater flexibility--by statute. Thus, there is no compelling reason to accomplish such ends through constitutional amendment. On the contrary, when they can be better accomplished through ordinary legislation, that is the route to take.

It is argued, however, that constitutionalizing the rights of victims of crime will give those rights a stature they otherwise would not have. That is true, but the argument must be weighed in light of both the larger constitutional design and some of the foreseeable implications of following the argument.

With regard to the first of those concerns, the Constitution, at bottom, is a document of delegated, enumerated, and thus limited powers. Notwithstanding the growth of federal power over the 20th century, the federal government has only those powers that the people, through the Constitution, have delegated to it, as enumerated in the document. That point is made clear in the very first sentence after the Preamble.[2] It is reiterated in the very last member of the Bill of Rights, the Tenth Amendment.[3]

By constitutional design, therefore, most power in this Nation rests with the states or with the people--even if today the design has been seriously compromised. The power to investigate and prosecute common law crimes--and to secure our rights against such crimes--is a case in point. Under our federal system, the Framers left such power almost entirely with the states. Thus, there is no constitutional authority for the vast growth of federal power over crime that we have seen over the course of this century--a point the Supreme Court revived only a year ago in the *Lopez* case,[4] and many in Congress are making, by implication, in a number of bills they have introduced during this session.[5]

---

[2] "All legislative Powers *herein granted* . . . ."

[3] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] United States v. Lopez, 115 S.Ct. 1624 (1995).

[5] For example, H.R. 2270 (The Shadegg-Pombo "Enumerated Powers Act"); H.Res. 431 (A sense-of-the-Congress resolution regarding the constitutional duty of Congress); S. 1629 (The Dole-Stevens "Tenth Amendment Enforcement Act of 1996").

It is not a little anomalous, therefore, to have an amendment to the Constitution addressing the rights of victims of crime when there is so little federal power to begin with to address the problem of crime. It would be one thing if the federal government, as at the state level, were required to attend to the rights of victims in connection with its general police power. But there is no general federal police power, as the *Lopez* Court made clear. This amendment has about it, then, the air of certain European, especially Eastern European, constitutions, which list "rights" not as liberties that government must respect as it goes about its assigned functions but as "entitlements" that government must affirmatively provide. We have thus far resisted that tradition in this Nation. It would be unfortunate if we should begin it through this "back door," as it were.

But if the absence of any general federal police power makes this amendment anomalous, still other implications for federalism are even more clear. By constitutionalizing certain "minimal" standards in this area, for example, the amendment would preclude states from experimenting in ways that might fall below the minimum. Moreover, it appears from the language of section 2 of the amendment that Congress would have the power to mandate states to take measures to implement the provisions of section 1, which amounts to nothing less than constitutionalizing a number of "unfunded mandates." If Congress has no such power, however, then the amendment may amount to an empty promise.

Finally, as a structural matter, such rights as are found in our Constitution, either enumerated or unenumerated, are invoked ordinarily when some governmental action either proceeds without authority (e.g., *Lopez*) or in violation of a recognized right (e.g., any authorized action that implicates rights of speech or religion). Thus, the putative authority of the government is pitted against the putative right of the individual or organization (to be free from such action, or from such an application of an otherwise authorized action).

Here, however, we have a three-way relationship, which raises havoc with our traditional adversarial system. How, for example, do we resolve the potential conflicts among the authority of the state to prosecute, the right of the accused to a speedy but fair trial, and the right of the victim to "a speedy trial, and final conclusion free from unreasonable delay"? If judicial "balancing" poses serious jurisprudential problems in our adversarial system today--and it does--then those problems will be only exacerbated under this amendment. Better to leave things as they now are, with victims entitled to civil actions against wrongdoers--and the state entitled to a separate criminal action in the name of the people. Better still to place the civil action first in time and priority--the better to truly recognize the primacy of the rights of the victim. After all, the injury to the people pales in comparison to the injury to the victim.

This leads quite naturally to the second concern noted above. Many of the practical implications of this amendment are of course unknowable without some experience trying to operate under it. But some problems are clear now, such as the just-mentioned potential for conflicting constitutional rights and powers. Since testimony in the Senate has already raised a number of such problems,[6] let me conclude with but one concern.

Clearly, rights without remedies are worse than useless: they are empty promises that in time undermine confidence in the very document that contains them--the United States Constitution, in this case. But a remedy is ordinarily realized through litigation. Before this amendment goes any further, therefore, it is incumbent upon those who support it to show how victims will or might litigate to realize their rights, and what their doing so implies for other rights in our constitutional system. I can imagine several scenarios under this amendment, none of which is clear, all of which--by virtue of being constitutionalized--will make the plight of victims not better but worse. Over the course of this century we have already made enough work for lawyers. We do not need now to make more--at the expense of those for whom the system has already failed once.

---

[6] See especially the April 23, 1996 testimony of both Bruce Fine and Professor Jamin B. Raskin.

NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE®
1757 Park Road, N.W
Washington, D.C. 20010
(202) 232-6682 Fax: (202) 462-2255
E-mail: nova@digex.net
Homepage: http://www.access.digex.net/~nova

Submission of John H. Stein, Deputy Director
National Organization for Victim Assistance
and Member of the Executive Board
National Victims Constitutional Amendment Network

to the

Committee on the Judiciary
United States House of Representatives
The Honorable Henry J. Hyde, Chairman

regarding consideration of

House Joint Resolution 174
a proposal to amend the Constitution of the United States
to recognize the rights of victims of crime

Mr. Chairman and Members of the Committee.

Part of the recent public record regarding the victims bill of rights now under the Committee's consideration is an opinion column by Scott Wallace published by The Washington on June 28.

Mr. Wallace is entitled to his opinions. At the same time, one would have thought that The Post's readership is also entitled to a correction of his many misstatements of fact.

Attached hereto, for the Committee's consideration is a draft "Taking Exception" column that leaders of the National Victims Constitutional Amendment Network submitted to The Post, which chose not to publish it.

National Victim Constitutional Amendment Network

National VCAN

July 1, 1996

To the Editor:

The public has the perception that some defense lawyers play fast and loose with the truth. That perception will not improve after reading Scott Wallace's distorted claims that the proposed federal Victims Rights' Amendment would mangle the Constitution (June 28).

The proposed amendment is a venerable idea that has been carefully studied. In 1982, after hearings around the country, the President's Task Force on Victims of Crime concluded that America's treatment of crime victims is "a national disgrace" and recommended, among other remedies, that basic victim rights be added to the Constitution. Thereafter, victim advocates took that idea to the great laboratory of the states, and the test results in those twenty-one states (soon to be joined by seven more) have been very encouraging. Their practical successes in bringing justice to victims put the lie to Mr. Wallace's distorted reading of the Federal proposal, and recall Justice Oliver Wendell Holmes' admonition that "experience, not logic, is the life of the law."

Rather than respond to victims' claims for equal justice under the Constitution, Wallace sounds one Chicken Little alarm after another: the federal amendment would produce hundreds of thousands of new hearings and staggering costs to the taxpayers . . . prosecutors' offices would be tied in knots . . . the courts would be crippled . . and corrections officials wouldn't know what hit them.

All the words are his. All are indictable as flapdoodle, with malice aforethought.

The centerpiece of Wallace's arguments holds that greedy crime victims will engage avaricious trial lawyers to sue for money damages when their rights are violated. Yet the lead sponsors of the amendment, Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-CA), have publicly promised to preclude civil damage actions in their final proposal. Victim advocates expected that concession, and know we can live with it — since virtually all state amendments prohibit civil suits, and are enforced, where necessary, by actions for injunctive relief.

Wallace says, falsely, the amendment would confer on victims a "right to protection" that law enforcement agencies could not meet. The actual language speaks of "reasonable measures to protect the victim," which would not demand the impossible of law enforcement. But it would have demanded greater efforts to protect people like Kristin Lardner, a young woman whose death at the hands of her known stalker led her father, Washington Post reporter George Lardner, to write a heartbreaking, Pulitzer Prize-winning report on how preventable her death actually was.

Wallace says, falsely, that the amendment would let victims "block a plea agreement," thereby sending to trial a multitude of cases now resolved through negotiation. But the amendment confers only the right to object to a plea agreement — a voice, not a veto — just as more than a dozen states now require in their constitutions, and dozens more by statute.

Hundreds of thousands of cases have ended with negotiated guilty pleas after the victim has been consulted, the vast majority of whom have accepted the rationale for the plea. Victims who remain dissatisfied can present their views to the judge, who may accept or reject them, but in either case, the judge will make a more informed decision on whether to accept the plea.

Wallace claims, falsely, that corrections officials would be hamstrung by such requirements as giving notice to victims whenever they "revoke an inmate's television privileges." This is a distortion of the plain language of the amendment's right to give victims notice of formal proceedings, a notification right which does not reach a prisoners' entertainment privileges. An even broader standard is found in many state constitutions — giving victims notice of an inmate's placement in a halfway house, for example — and in any event, new computer-assisted message systems provide a cheap tool to notify victims of every kind of developments in their case.

Wallace asserts, falsely, that the grant of a right to speedy trial to victims "helps nobody but the defendant," since it would force unprepared prosecutors to throw in the towel or lose at trial.

• 789 Sherman Street, Suite 505 • Denver, Colorado 80203 • (303) 832-1522 • 1 800 529-8226 • fax (303) 861-1265 •

///

Again, experience matters, not to mention common sense: constitutional speedy trial provisions for victims already exist in California, Florida, Illinois, and Michigan, among others, yet no rash of dismissals or acquittals has materialized there. The reason is obvious: if a *victim's* new speedy trial rights could somehow be used to trip up unprepared prosecutors, surely the *defendant's* old speedy trial rights, long embedded in the Sixth Amendment, would have done the same.

It never happened because the Supreme Court holds that both the prosecution and the defense must be accorded adequate time to prepare for trial, "speedy trial" or not.

Further, a defendant's right to speedy trial was clearly needed when the Bill of Rights was adopted, and it is a bulwark against tyranny that should be preserved for all times. But today the tactical advantage to the defense is in delay, not speed. In Florida, for example, prosecutions of child sexual abuse cases are plagued with a dozen or more hearings and postponements. The latter are largely defense-initiated in the hope of forcing the victim's family to become disheartened.

Can you imagine the effects of even *two* trial postponements in the life of a child who had been brutally sodomized? Can you imagine the effects of *six*? The Victims' Rights Amendment would bring an end to such outrages.

Wallace paints, falsely, an elaborate scenario in which Federal grants to victim assistance and compensation programs would "dry up if the Constitution requires restitution to be fully paid" before any fines. As he notes, fines collected from Federal offenders are the lifeblood of the Crime Victims Fund, which supports the state and local victim services of which he is so solititous. Making Federal offenders pay full restitution to their victims first, he reasons, would cripple their ability to pay any of the fines imposed at sentencing.

Whether he is ingenuous or merely ignorant on this point, the facts are these: by a statute already on the books, Federal offenders must pay their victims restitution in full before their assets can be applied to pay the fines that are transferred to the Crime Victims Fund. Thus, the victims' amendment will have no effect — zero — on this funding scheme. Similarly, state methods of getting financial support of their compensation and assistance programs from offender penalty assessments would be fully protected under the proposed amendment. The suggestion that victim advocates would jeopardize victim assistance on the altar of victim rights is offensive.

To answer Wallace's attacks, as we have sought to do, comes at a price. We have played on his field, or rather that of the National Legal Aid and Defender Association, of which he is special counsel, without offering the affirmative case for our cause.

For example, we cannot expound on last week's awful ruling that victims of the Oklahoma City bombing may either observe the trial or speak their hearts at any sentencing proceeding — but not both. Nor can we describe the pleas of a battered woman to be notified if her vengeful abuser were ever released from prison — pleas that were fatefully ignored.

To better describe the needs and the proposed remedies, we must defer to our Congressional allies and other supporters — like Harvard law professor Lawrence Tribe and Princeton professor John Dilulio, like Bob Dole and President Bill Clinton — and take courage from the simple injunction of Justice Benjamin Cardozo:

"Justice, while due the accused, is due the accuser also."

Paul G. Cassell John H. Stein

—

Mr. Cassell, a Professor of Law at the University of Utah College of Law, is a self-described Reagan Republican; Mr. Stein, the Director of Public Affairs at the National Organization for Victim Assistance, is a self-described Kennedy Democrat. Both serve on the Executive Board of the National Victims Constitutional Amendment Network.

Both can be reached Monday at the N-VCAN meeting in Washington at 202-588-1064; otherwise, Mr. Stein can be reached at the NOVA Headquarters at 202-232-6682, and Mr. Cassell at the law school at 801-585-5202.

NATIONAL
LEGAL AID &
DEFENDER
ASSOCIATION

August 19, 1996

The Honorable Henry Hyde
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Hyde:

A Washington Post Op-Ed I wrote raising questions about the practical impact of the proposed victims rights constitutional amendment has been criticized in a formal submission to your Committee by spokesmen for the National Victim Constitutional Amendment Network and the National Organization for Victim Assistance. Since their submission contains numerous misstatements, and there is a serious possibility of swift congressional action on this important measure, this response is being furnished to provide a fuller record to assist the Committee in its deliberations.

The National Legal Aid and Defender Association, on whose behalf I wrote the article, does not approach the proposed amendment, as the writers suggest, simply as defense lawyers. NLADA's members span both sides of the debate: our defender members represent indigent individuals accused of crime, and our civil members represent indigent victims. As President Clinton pointed out recently in discussing domestic violence, one out of three clients represented by legal services lawyers around the country is a poor woman or child in need of protection against an abusing family member. Our commitment is to ensuring equal justice for indigents, whether defendant or victim, and to maintaining an effective and balanced American justice system accessible to all. Indeed, both defendants and victims had their own spokesmen at the recent House Judiciary Committee hearings (the National Association of Criminal Defense Lawyers and various victims organizations); in accepting the Committee majority's invitation to testify, we viewed our role as one of providing a broader perspective on the practical ramifications for the justice system as a whole.

Like so many other groups, NLADA strongly supports the proposed constitutional amendment's goals of protecting victim's rights. We have long supported criminal sanctions which stress accountability to the victim, such as restitution and victim-offender mediation, as well as accountability to the community victimized, through community service. We have worked with the Justice Department to promote restorative justice models embraced by victims organizations, which incorporate victims as partners in the criminal justice process. We worked closely with Congress to produce the historic federal victim restitution legislation enacted this year in the terrorism bill.

The VCAN spokesmen, Cassell and Stein, state that our concerns are nothing but falsehoods, maliciously raised. As discussed below, our concerns are rationally

based, and are shared by many. Even the congressional authors of the proposed amendment have apparently respected the concerns we raised; Senators Feinstein and Kyl are currently circulating revised drafts narrowing the amendment in each of the areas we identified.

Cassell and Stein characterize as a falsehood the possibility that the new speedy trial rights for victims may force prosecutors to trial before they are ready. This is a concern that originated not with us, but with prosecutors themselves. Justice Department officials, in discussing the administration's support for the general concept of a victims rights constitutional amendment, singled out the speedy trial right as one element that they could not endorse. Prosecutors fear that it might "interfere with our ability to prosecute effectively," said Associate Attorney General John Schmidt in a press briefing on June 25, 1996. In situations where the victim and the prosecutor have different views about when a case should go forward, there could be two basic outcomes: either the prosecutor would prevail over the victim's objections, or the victim would prevail over the prosecutor's objections — which would be, said Mr. Schmidt, "to put it mildly, a very delicate matter" for prosecutors to accept. Faced with this dichotomy, and a strong administration desire that the amendment should contain only "real rights" rather than "hortatory language that has no real bite to it," Mr. Schmidt explained that "we were unable, at least at this point, to come up with a formulation that we thought was workable." Subsequently the U.S. Judicial Conference Criminal Law Committee voiced similar concerns in a July 16 letter to the Senate Judiciary Committee, wondering whether the speedy trial right would mean "forcing prosecutors to begin trying cases before they have completed their investigations." The speedy trial right has been deleted from Feinstein/Kyl redrafts.

Cassell and Stein dismiss concerns about the impact that the notice and opportunity-to-be-heard rights might have on correctional operations, arguing that the "plain language" of the amendment would have minimal impact because it would not cover minor disciplinary proceedings in prison. [They do not disagree that the amendment would apply to proceedings such as setting a release date or deciding whether to place an electronic monitoring bracelet on a parolee's ankle, requiring corrections officials to begin the day the amendment took effect the process of identifying, tracking and notifying victims of every one of the 5 million criminals currently under correctional control, including the 1.5 million who are incarcerated.] But the amendment's language draws no such line around prison disciplinary proceedings; it extends to "every proceeding" at which the offender is present, which according to corrections officials would indeed include suspension of inmate privileges for a disciplinary infraction. A preliminary impact assessment by Texas corrections officials projects that in that state alone, approximately 350,000 disciplinary proceedings per year would be covered, plus approximately 200,000 inmate classification hearings (see enclosed). The assessment raises the concern that because of the cost and burden of the new procedural requirements, prison administrators might cut back on disciplinary enforcement, making management of the inmate population "more difficult and more dangerous." It also discusses administrators' inability to guarantee the safety of victims coming into prisons on a daily basis to attend the proceedings.

The Feinstein/Kyl redraft seeks to address such concerns by limiting the notice and

opportunity-to-be-heard rights to proceedings which are either "public" or "involve a release from custody." These changes, however, are unlikely to mitigate the impact on corrections; although prison disciplinary proceedings are not generally public, every one of them can affect an inmate's release date, by affecting good-time credits, parole or other release determinations. And of course, the changes leave untouched the need for notice and an opportunity to be heard in non-correctional settings, including millions of encounters with suspects or arrestees by police or prosecutors every year, each involving a potential release from custody.

Cassell and Stein reject the possibility that the amendment might impair existing state victim compensation and assistance programs by requiring offenders to fully pay restitution before paying the fines which are the primary funding source for such programs. Again, this is not a concern that originated with us; it came from victims' advocates themselves. The amendment's primary drafter, Steve Twist — a member of the VCAN executive board — testified in the Senate in April that if it were made a constitutional right, the payment of restitution "would take precedence over any other payments to the government ... such as fines." In a Senate hearing last November on a federal statute to require restitution in all federal cases, David Beatty, Director of the National Victim Center and another member of the VCAN executive board, warned that giving restitution priority "may operate to seriously undercut payments to the Victims of Crime Act Fund [which provides direct financial assistance to more than 3,000 victim assistance organizations across the country] in cases where offenders lack the resources to fully satisfy both." And as Judge Maryanne Trump Barry testified at the same hearing on behalf of the U.S. Judicial Conference, more than 85 percent of all federal defendants are indigent and cannot pay both restitution and fines, a figure which at the state level is closer to 90 percent. "We have grave concerns," concluded Mr. Beatty, "over the possibility that full mandatory restitution in all criminal cases may benefit individual victims in a single case at the expense of the thousands of victims who are served by VOCA funded victim assistance programs."

Cassell and Stein argue that the proposed constitutional provision on restitution would do nothing that has not already been done to victim-program funding by the federal restitution statute enacted in the terrorism legislation in April. Restitution must be paid first under the new statute, they believe, then fines. It is they who are mistaken on this point. The new statute flatly gives fines precedence over restitution (under 18 U.S.C. §3663(c)(5), as added by §205 of P.L. 104-132), no doubt in response to the above-quoted objections from the victims community. The constitutional amendment would trump the statute. It would reverse this priority, putting restitution first, as Mr. Twist said was the goal, and Mr. Beatty said was the problem. The confusion of the victims community itself on this key point is a compelling demonstration of the need for responsible study of the impact of the amendment.

The restitution provision is fundamentally altered in the Feinstein/Kyl redraft. In apparent recognition of the futility of seeking to enforce restitution against the vast majority of offenders who are indigent, the original unqualified right to full restitution is proposed to be changed into a right to "an order of" full restitution. Victims' interests are hurt in two ways: not only will fines dry up as a funding source for victim assistance programs, but individual victims may well feel

betrayed when they learn that the Constitution's reference to restitution guarantees them nothing more than a symbolic piece of paper "ordering" it, from an offender who, nine times out of ten, can not realistically be forced to pay it.

The latest redraft would add another fundamental insult to victims, by containing a non-retroactivity provision. Presumably to cut the cost of the amendment, crimes committed before its ratification would not be required to be covered. Every single crime victim in America today who is supporting this amendment to help deal with a crime already committed would be guaranteed absolutely nothing. It is doubtful that most victims around the country will see any rationality in protecting only victims who don't exist yet.

Cassell and Stein dispute my suggestion that police may have reason to worry about giving victims a constitutional right to protection from further violence or intimidation by their accused or convicted attacker. They say that the amendment would not demand the impossible of law enforcement, but simply "greater efforts" to protect people like Kristin Lardner, murdered by her long-time stalker. My point was not that the police *cannot* protect a Kristin Lardner, but that when hundreds or thousands of Kristin Lardners are equally guaranteed "greater" police protection, a logistical and legal nightmare is set in motion for police. How do they balance their other duties to protect the community with this constitutional mandate to give greater attention to certain stalking and domestic violence cases? Victims or their survivors who attribute an attack to the lack of "greater" police protection will understandably feel invited to seek legal redress for violation of their constitutional rights. Will federal judges be required to second-guess discretionary police decisions about the allocation of manpower and resources? The amendment imposes greater duties, risks and costs on law enforcement, the precise scope of which may be in doubt but which Congress and law enforcement bodies with research capabilities should explore before the amendment proceeds farther.

The Feinstein/Kyl redraft seeks to address this concern by diluting the right to "reasonable measures to protect the victim" into a right to "reasonable conditions of confinement or release" to protect the victim. As with restitution, the change is practical, but the results are purely symbolic; victims are not guaranteed protection, they are only guaranteed a piece of paper from a court which may or may not be enforced by overworked police or probation officers.

The newest redraft moves this provision startlingly away from the symbolic, to give victims a right to "reasonable release conditions or confinement to protect the victim from violence or intimidation." A "right to confinement?" This would appear to give one individual a constitutional right to have another incarcerated, triggered by nothing more than "intimidating" behavior. This is undoubtedly the most radical and untested restructuring of the constitutional balance of the criminal justice system ever attempted in a victims-rights measure; one can only attribute it to inadvertent and inartful drafting.

Cassell and Stein correctly state that the amendment would grant victims the right to object to plea agreements. But they incorrectly state that my article characterizes this as a veto

right; the article clearly says that victims would be "entitled to object." (Reading it as a veto right is not necessarily far fetched, however; the U.S. Judicial Conference Criminal Law Committee expressed concern in its July 16 letter to the Senate Judiciary Committee about whether the constitutional provision would make a victim's objection binding upon the court.) But my assumption is also that the proponents expect victims' objections to defeat *some* proportion of plea agreements, or else the provision would have no effect at all and would not be worth fighting for. The practical problem is that even a modest decrease in cases disposed of by plea means a very substantial increase in the trial workload not only of prosecutors, but of courts and indigent defense. Even a five percent reduction in guilty pleas means a 33 to 50 percent increase in trials, as the Federal Courts Study Committee found in its comprehensive final report in 1990 (p. 137). If this type of workload increase is extended over the entire state and federal justice system, there are obviously severe potential consequences both in terms of resources and the ability of both the civil and criminal justice systems to continue functioning effectively. The point is not that providing victims an increased voice in plea dispositions should not be tried, but simply that more needs to be learned about its practical effect before a specific formulation of such a right is forever enshrined in the U.S. Constitution.

Finally, Cassell and Stein express indignation at my suggestion that victims who have been injured by a violation of their new constitutional rights might wish to have some way of enforcing those rights which would compensate them for the harm they have suffered. The two of them would be satisfied, they say, with an express preclusion of civil damage actions in the constitutional amendment, since victims are not "greedy." On behalf of "victim advocates," they say, "we can live with" such a limit.

First, the concern about civil actions for damages by victims no more connotes "greed" on the part of the plaintiff victim than any §1983 action connotes "greed" on the part of, for example, an African American denied a state job because of his color. To equate just compensation with "greed" reveals a simplistic misunderstanding of the entire American civil justice system and the protections of the U.S. Constitution.

Second, concerns about public officials' exposure to lawsuits by victims are not speculative or invented by NLADA. They have come from throughout the justice system — including the Justice Department, the U.S. Judicial Conference, corrections officials (e.g., the Texas report) and the American Bar Association. As Cassell himself generously conceded in April 23, 1996 testimony before the Senate Judiciary Committee on the proposed federal victims rights amendment: "Reasonable minds can defer [sic] on whether the federal amendment should permit civil actions for damages for violations of rights."

Third, the fact that certain "advocates" for victims organizations "can live with" stripping fundamental constitutional rights of any meaningful remedy may not sit well with the millions of individual crime victims who have not been a party to these inside-the-beltway drafting negotiations. The creation of rights without remedies creates an enormous risk of public backlash and cynicism which would undermine the amendment's basic goal of a more user-friendly justice

system. Consider a case where 1) a victim's constitutional rights have already been violated, e.g., lack of notice of a release or escape, or lack of opportunity to object to a plea bargain, and 2) the victim has suffered serious harm — anything from emotional distress to a physical attack or death at the hands of the escaped or improperly released offender. Prospective relief such as an injunction or mandamus action is not only ineffectual, but the particular victim may simply lack standing to force the errant police department, prosecutor, judge or parole board to improve their procedures in the future. The lack of a compensatory remedy will be very difficult to understand for a victim who has incurred hundreds of thousands of dollars of medical costs, lost income, or death/funeral expenses as a direct and foreseeable result of a government official's negligent or reckless failure to provide notice or other constitutional protections for victims. And they will find it difficult to accept that they cannot recover a dime for grievous injuries resulting from a clear trampling of their constitutional rights, while the rest of the justice system doles out millions of dollars in damages for too-hot coffee or inappropriate BMW paint jobs. It is a nonsensical outcome, and the public's outrage will be great, forcing someone — whether the courts or the legislatures — to graft a remedy onto the rights.

To provide federal rights without remedies violates our oldest legal traditions. Nearly two centuries ago, in *Marbury v. Madison*, the Supreme Court declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 Cranch 137, 163 (1803). And as Justice Harlan noted when the Court decided to create compensatory remedies even though none existed for a violation of the Fourth Amendment, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971), "some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court." Clearly, he wrote, "for people in Bivens' shoes, it is damages or nothing."

The fact is that victims advocates who are willing to bargain away compensatory remedies in order to win a federal constitutional amendment are undermining their own case. If hortatory language is the goal, this is already available through the highly successful route of amending state constitutions. If the unique and powerful protections of the U.S. Constitution are not desired, such as §1983 and *Bivens* actions, then the argument in favor of amending the U.S. Constitution is reduced to one of uniformity — i.e., an undermining of traditional states' rights in the criminal law area which requires close analysis in its own right. In this regard, the National Association of Attorneys General passed a resolution at its June 1996 summer meeting warning that putting a victims amendment into the U.S. Constitution is "a decision of the utmost importance which cannot be taken without due regard for established principles of federalism" (resolution attached).

But if full rights and remedies — "real rights," as Associate Attorney General Schmidt says — are the goal, or at least the inevitable ending point, then the practical impact must be studied. And the primary practical impact will be on those government officials whom the amendment would compel to act and punish for not acting: police, prosecutors, judges, probation, parole and corrections officials. Even if enforcement is by way of injunction alone, this entails

contempt sanctions to deal with noncompliance, including fines against the offending governmental entity, with all the collateral costs of litigating these separate legal actions. The secondary impact will be on the other players in the justice system, including not just defendants, but victims, lawyers for both, users of the civil justice system, and the public at large. Distracting the time and resources of the primary players with substantial new responsibilities and risks will have a ripple effect on the quality of justice and protection available to the rest of society.

The latest Feinstein/Kyl redraft proposes to limit the available remedies in a number of ways, principally by seeking to prohibit any cause of action for damages against any governmental subdivision or public official. Aside from cutting off any meaningful relief in cases of violations which have already occurred, this formulation raises troublesome questions for indigent defense; though a public defender may be protected by virtue of being a public official, the same protection would not appear to extend to their colleagues who perform exactly the same function in different jurisdictions as private lawyers — either through individual appointments or contracts for a set period or number of cases. Can they be sued for provoking "unreasonable delay" or failure to notify regarding a negotiated plea? Will this simply produce a bonanza for legal malpractice liability insurers? Will it single out defense lawyers as the only criminal justice players subject to actions for damages?

The redraft also proposes to bar any type of relief "for an accused or convicted offender," presumably to limit the protections of the amendment to "innocent" victims. But the provision is nonsensical in many ways. There is no requirement that the accusation or conviction bear any relation to the victimization incident; a woman convicted of shoplifting would have no rights against a battering husband. There is no staleness limitation; an accusation or conviction 30 years earlier would remove all rights from today's victim of a vicious assault. And what is an "accusation?" Something less than an arrest (like Richard Jewell in the Olympics bombing)? Must it come from law enforcement, or might it also come from the media, or within the community? Why deny rights to an "accused offender" who is actually innocent? When, if ever, does an "accusation" fade as a disqualification for victims rights? Why no distinction between felonies and misdemeanors or petty offenses, or violent versus nonviolent crimes? Who is responsible for investigating and determining whether victims have any prior convictions or accusations which would render them ineligible for all the constitutional protections? The police in the middle of an investigation? The prosecutor juggling hundreds of cases? If it is left to victims to voluntarily disclose their ineligibility, what recourse do police or prosecutors have if the victim has lied, and wrongfully consumed valuable governmental time and resources accommodating the victim's rights? Could government officials sue victims for nondisclosure of their ineligibility? Could they recover restitution? Would the nondisclosing victim be guilty of an offense herself? Will this provision perversely turn victims into suspects — i.e., sending police and prosecutors the message that they can cut their costs under the amendment by uncovering some dirt in the victim's past?

On the fundamental question of whether the proposed rights cannot just as well be established by way of statutes, executive orders and state constitutional provisions, Cassell knows better than most that the U.S. Constitution offers no bar to any such approach. He has been

involved in successful litigation sustaining state constitutional provisions on victims rights against federal constitutional attack. In his lengthy and scholarly Senate testimony in April, he stated that his research revealed absolutely nothing in the U.S. Constitution which would conflict with the new federal victims rights amendment. He related the many ways in which the Utah constitutional amendment, which he helped enact, has made a "dramatic difference" in improving the treatment of victims in the Utah criminal justice system. At the same hearing, the co-chairman of the National VCAN described compellingly and proudly his first-hand observations of the vastly improved treatment of victims under state constitutional amendments, including those in Colorado, Michigan and Florida, where the treatment of crime victims before and after adoption of the amendment "differed as night does from day."

The proponents of a federal constitutional amendment have cited only two specific areas where defendants rights under the U.S. Constitution have frustrated state constitutional protections for victims: the exclusion of victims from a trial courtroom if they may later be called as a witness, and the presentation of victim impact statements at time of sentencing. The President and his staff cited cases on both these points on June 25 to show that amending the U.S. Constitution was the only way to protect victims rights.

But both cases have now been overruled. On the victim-exclusion issue, the authority cited was a Utah trial court's ruling that a defendant's due process rights would be violated by letting a victim sit in the courtroom and hear other witnesses testify before testifying herself. But just two weeks after the White House press conference, in a case in which Cassell himself submitted an amicus curiae brief, the Utah Court of Appeals unanimously rejected this argument against the state constitutional provision allowing the victim to be present throughout the trial. *Utah v. Beltran-Felix*, 1996 Utah App. LEXIS 75 (July 5, 1996). The court reviewed federal constitutional challenges to victim/witness exclusion around the country, and found not a single case suggesting any constitutional problem with such victim attendance. In his Senate testimony, Cassell strongly agreed with this finding, citing numerous cases upholding exceptions from sequestration orders for crime victims or family members; indeed, he went further, to suggest that the confrontation, public-trial and due process provisions already in the U.S. Constitution affirmatively mandate allowing victims to attend criminal trials.

In fact, the exclusion of victim/witnesses from trials does happen routinely, but it is based on the rules of evidence, such as federal rule 615, rather than the Constitution. And just as rule 615 presently contains an exception of unquestioned constitutionality allowing the law enforcement agent most familiar with the case to remain in the courtroom throughout the trial even if he or she will later be called as a witness, so too could Congress simply add an exception for victims. Such an amendment to the evidence rules could be detailed enough to include safeguards such as allowing victims to testify first (the resolution contemplated by Justice Department officials even under a constitutional amendment) or by videotape if later testimony is desired. Situations where new victim testimony is needed later in a trial, such as rebuttal testimony after the victim has heard other witnesses, could be dealt with by instructions to the jury that the possibility of tailoring the testimony is a credibility question for them to weigh.

Likewise, the victim-impact-statement case from New Jersey cited by the President was overruled by the New Jersey Supreme Court just three days after the White House briefing. The court upheld the provision in the state constitution allowing victim impact evidence, used in this case in the sentencing phase of a murder trial, against challenges under both the federal and state constitutions. *State v. Muhammad*, 59 Cr.L. 1385 (June 28, 1996). The victim's mother, whom the President had at his side and whose emotional ordeal he described vividly, has already had her rights vindicated without the need for amending the U.S Constitution.

The speed with which these specific arguments for amending the U.S. Constitution have evaporated in the courts is a sobering example of why tampering with our nation's most sacred charter is generally considered only as a last resort, after all the litigation is over and the U.S. Supreme Court has firmly shut the door. Here, the litigation is in its infancy, and the door to nonconstitutional victim protections remains wide open.

In summary, NLADA emphatically stands by the concerns expressed in the Washington Post and our testimony. All current indications are that the amendment will bring the criminal justice system to its knees, and offer negligible benefit for victims. And the harm will be inflicted primarily on the public employees whose job is to fight crime and process criminal cases, with potentially serious consequences for public safety and expenditures. It is no accident that the more the amendment is studied by these key players in the justice system, the more they shrink from it. Despite broad support for the goals of the amendment, and despite the obvious possibility of very quick action in Congress, major organizations are having difficulty endorsing a constitutional amendment until the practical ramifications are better known and other approaches are weighed.

- The National Association of Attorneys General recently had the amendment under consideration but could not endorse it. The June 1996 resolution referred to above, while voicing strong support for state constitutional amendments and legislation, noted that "questions have been raised about the impact of the proposed [federal] amendment on state criminal and juvenile justice systems," and called for the appointment of a working group to study its impact and the need for it and to assess other ways to accomplish its goals. The constitutional amendment would be endorsed and modifications recommended only if the working group "determined that a constitutional amendment is necessary."

- The National District Attorneys Association had the amendment under consideration at its July 1996 annual meeting. Amid philosophical agreement with the goals of the amendment, practical concerns were raised, and a working group was appointed to study the proposal and the range of other ways to achieve its goals.

- The American Bar Association Section of Criminal Justice, in a resolution proposed by prosecutor members at its August 1996 meeting, stated strong support for the concept of victims rights but urged trying legislation first. In amending the Constitution, "extreme caution" was recommended to avoid interference with defendants' rights, judges' discretion to manage court proceedings, and prosecutors' discretion to charge and plead,

and to ensure that the costs are fully known and covered by appropriation.

• A letter from scores of law professors warns that the amendment could invalidate numerous state laws regarding probation, parole, pretrial detention, intimidation and stalking, restitution and victim-offender mediation. All would be subject to perpetual federal court oversight. Indigent crime victims could demand court-appointed counsel. The preclusion of compensatory remedies "reflects considerable confusion on why an amendment is necessary and what purpose it would serve." The Constitution "should not be amended unless there is a pressing necessity to do so, and no such necessity exists in this instance."

• The U.S. Judicial Conference Committee on Criminal Law, in its July 16 letter to Senator Biden, warned of decades of litigation refining the ambiguous concepts in the amendment. It raised the possibility that the amendment might overrule the federal mandatory restitution and habeas corpus reforms just recently enacted in the terrorism legislation. It urged the "utmost prudence and caution" and "thorough and exhaustive deliberation." It suggested that Congress "seriously consider initially promulgating these rights statutorily" — a "prudent step [which] would much more easily accommodate any 'fine tuning' deemed necessary or desirable."

The concerns of such groups echo precisely the concerns NLADA has articulated. Our concerns are no more false, or malicious, than theirs, and such accusations demean the accuser more than those accused.

We hope that the Congress will not let the emotionalism of the debate short-circuit rational discourse. There are many unexplored problem areas, and no need to rush. The Republic has survived for over 200 years without a federal victims rights constitutional amendment; indeed, victims rights have improved dramatically in recent years through statutory and state constitutional means. Taking the time to study the efficacy and potential impact of federal constitutional versus other protections would seem to be the most likely route to true victim protection with minimal unintended collateral harm to the American justice system.

We respectfully request that this submission be made a part of the formal record of the Judiciary Committee's hearing.

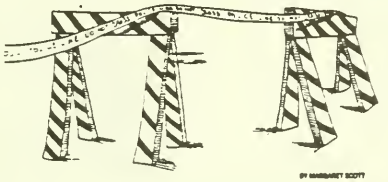
Sincerely,

H. Scott Wallace
Special Counsel

cc: Members of the Judiciary Committees

THE WASHINGTON POST

FRIDAY, JUNE 28, 1996 A23



BY MARGARET SCOTT

Scott Wallace

Mangling the Constitution

The folly of the victims' rights amendment.

Bob Dole has proposed a constitutional amendment creating new rights for crime victims, because, as he says without elaboration, "the president must be on the side of the victims." Just this week, President Clinton endorsed the idea, too. Criminal defendants have plenty of rights, goes the reasoning, so why shouldn't victims?

Such an amendment may seem politically irresistible, but in fact there is something in it for just about everybody to object to, including victims.

Under the leading Senate measure, victims in every federal, state and local jurisdiction would have the right to be informed of and be present at any stage of the criminal process at which the defendant might be present. They would be entitled to object to a negotiated plea or a release from custody. They would be guaranteed a speedy trial and a conclusion free from unreasonable delay; full restitution from the offender; police protection against violence or intimidation by the accused or convicted offender, and—unspoken but essential—some way of enforcing those rights.

In practice, though, how would police feel about giving victims a constitutional right to protection from further violence by their accused attacker? Nobody in the nation now has a constitutional right to police protection, and for good reason: lawsuits. People unhappy with police protection would sue to get more of it. People injured because there wasn't enough of it would sue for money damages.

Prosecutors' offices would be tied in knots. They currently resolve nine out of 10 cases by plea agreement. Letting a victim block a plea agreement means a lengthy trial, and it takes away a prosecutor's best tool for inducing cooperation against more serious criminals. Forcing a case to a "speedy" trial before the prosecution is ready helps nobody but the defendant.

Corrections officials wouldn't know what hit them. About 5 million people are under correctional control, 1.5 million of whom are incarcerated. The day this constitutional amendment took effect, corrections authorities would have to start identifying, tracking down and notifying victims of crimes that might be decades old every time any proceeding involving an offender occured, from setting a release date to deciding whether to revoke an inmate's television privileges or place an electronic monitoring bracelet on a parolee's ankle.

The courts particularly would be crippled, and not just by being forced to provide more trials faster. By granting a right to a "final conclusion free from unreasonable delay" in addition to a "speedy trial," the amendment could open up the possibility of a victim a suing a judge for not wrapping up a case fast enough. It would also trump the exhaustive habeas corpus statute that Congress finally has passed to speed up the review of criminal convictions, reopening worlds of ambiguity about whether any delay incurred in correcting a wrongful conviction could possibly be "unreasonable."

And the burdens imposed on the courts by giving victims a constitutional right to full restitution would be not only massive but pointless. More than 85 percent of all criminal defendants are indigent, with no ability to pay restitution. Yet courts still would be required to hold hundreds of thousands of hearings to determine who was harmed and exactly how much, and to issue a precise, fair, but completely useless order.

Moreover, forcing the nation's probation officers to endlessly pursue uncollectible debts would take them away from their main job of supervising defendants and ex-inmates.

Perhaps the biggest losers, though, would be ordinary Americans. Given the drain on the time and resources of society's crime-fighting institutions, including prosecutors, police, courts and probation officers, the public actually would be less safe with such an amendment in force. And the amount of taxpayer dollars spent could be staggering.

Consider the cost of identifying, locating and notifying every victim at the hundreds of routine stages of the criminal justice system where the defendant is entitled to be present—and then arranging to schedule the proceeding to fit the victim's availability. Consider the complexity of trying to figure out just who qualifies as a victim of crimes such as drug dealing, racketeering conspiracy or a toxic discharge into a river by a corporation. Add the cost of the extra trials and longer prison sentences when victims oppose plea agreements or release dates. Add to this the cost of more government lawyers and probation officers, adjudicating the complaints of victims' whose rights have been neglected, and the damages ordered to be paid out of public coffers.

Oddly enough, the amendment would undermine the best assistance program victims already have: the compensation funds around the country that provide quick monetary help, counseling and support services in the traumatic aftermath of a violent crime. The criminal fines that fund these programs would dry up if the Constitution requires restitution to be fully paid first.

In fact, the only likely winners under the proposed constitutional amendment would be trial lawyers. When they persuade a victim to sue police, prosecutors and other government agencies for failure to give victims the attention to which they are constitutionally entitled, they will pocket one-third of every judgment. Rights without remedies are meaningless, and money damages are the only possible remedy when people have been seriously injured because the government violated their constitutional rights. Damages could be enormous for severe injuries directly traceable to a failure of required police protection, a failure to notify about a release or escape, or a lack of opportunity to object to a plea or a release.

But despite these fairly obvious, and disastrous, practical ramifications, the debate has not yet progressed beyond platitudes of concern for crime victims. And despite legislation on the books mandating cost assessments of pending crime bills and of unfunded mandates Congress forces upon the states, absolutely no cost inquiry has been conducted.

In this fact-free campaign environment, such a politically appealing sop to victims could pass Congress in a heartbeat. Congress should take a deep breath, count to Nov. 5, and then decide dispassionately whether the measure merits more careful examination.

The writer is special counsel with the National Legal Aid and Defender Association.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
444 NORTH CAPITOL STREET SUITE 339
WASHINGTON, DC 20001
(202) 434-8054
(202) 434-8056 FAX

CHRISTINE T. MILLIKEN
Executive Director
General Counsel

August 15, 1996

The Honorable Henry J. Hyde
Chairman, House Judiciary Committee
United States House of Representatives
2110 Rayburn
Washington, D.C. 20515

Dear Congressman Hyde:

As chair and vice-chair of the National Association of Attorneys General ("NAAG") Victims' Rights Task Force, we write on behalf of the state attorneys general to you, as Chairman of the U.S. House Judiciary Committee, to express our interest in the proposed victims' rights Constitutional amendment.

The NAAG Victims' Rights Task Force was created by a resolution adopted at the NAAG Summer Meeting. Under the resolution, a copy of which is attached for your information, the task force is instructed to study, analyze and make a recommendation on the proposed crime victims' rights Constitutional amendment.

It is a challenging task that we are attempting to accomplish as quickly as possible. We are currently working to develop an informed consensus opinion that reflects both the importance of this policy decision and its broad implications. We look forward to working closely with the Congress, the administration, and the victims' rights community.

This is an issue in which many attorneys general have been very involved in their respective states. As you are aware, more than twenty states already have a victims' rights provision in their state constitutions and all but six states have either a constitutional or statutory provision.

It is critical that the combined expertise of the states be used on this important issue. We look forward to working with you.

Sincerely,

Jeremiah W. (Jay) Nixon
Attorney General of Missouri
Chair, Victims' Rights Task Force

Jeffrey R. Howard
Attorney General of New Hampshire
Vice-Chair, Victims' Rights Task Force

Enclosure
cc: Attorney General Scott Harshbarger, Commonwealth of Massachusetts, NAAG President
Christine Milliken, Executive Director, NAAG

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting
June 9-12, 1996
St. Louis, Missouri

RESOLUTION

SUPPORTING THE NEED FOR ENHANCED VICTIM PARTICIPATION IN AND ACCESS TO THE CRIMINAL JUSTICE SYSTEM

WHEREAS, millions of people and households in the United States are victimized by crime each year; and

WHEREAS, many victims and their survivors face substantial financial loss, physical injury, emotional trauma and significantly reduced quality of life; and

WHEREAS, family members and friends of victims and survivors of crime also suffer from similar trauma; and

WHEREAS, victims have a right to be treated with dignity, respect, courtesy, and sensitivity and the criminal justice system still fails to provide too many victims with meaningful access and participation; and

WHEREAS, twenty states already have amended their constitutions to provide for the rights of victims in their state criminal justice process; and

WHEREAS, a similar number of states currently have statutory provisions affording crime victims certain rights in the criminal justice system; and

WHEREAS, Congress recently passed legislation making restitution mandatory in all federal criminal cases; and

WHEREAS, a number of states have similar laws requiring orders of restitution in criminal cases; and

WHEREAS, the National Association of Attorneys General has supported victims of crime legislation since at least 1979; and

WHEREAS, a proposed Victims' Rights Constitutional Amendment was recently introduced in both Houses of Congress; and

WHEREAS, the decision to amend the United States Constitution is a decision of the utmost importance which cannot be taken without due regard for established principles of federalism and for the hard won protections victims of crime now enjoy under state law; and

WHEREAS, questions have been raised about the impact of the proposed Amendment on state criminal and juvenile justice systems;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Reaffirms its commitment to support victims' rights through support for appropriate constitutional amendments in states, commonwealths, and territories that do not have such an amendment;

2. Reaffirms its commitment to support enactment of a meaningful statutory Victims' Bill of Rights in states, commonwealths, and territories that do not already have such a statute;

3. Authorizes NAAG to establish a working group to: (a) study and develop an understanding and analysis of the proposed constitutional amendment , its impact upon the states and the necessity of the proposed amendment; (b) work cooperatively with the Congress, the U.S. Department of Justice, the National District Attorneys Association, victims' rights groups and other interested groups or organizations as necessary to accomplish its goals; and (c) if it is determined that a constitutional amendment is necessary, suggest any recommended modifications to the proposed amendment; and

4. Authorizes the Executive Director of the Association to transmit the resolution to all appropriate entities.

Approved June 11, 1996

A96SMRES 08

BOB DOLE
FOR PRESIDENT

June 21, 199[illegible]

The President
The White House
Washington, D.C.

Dear Mr. President:

I was pleased to read the news accounts today suggesting that you may soon endorse an amendment to the United States Constitution guaranteeing certain basic rights for the victims of crime. As you may know, I endorsed a federal victims' rights amendment last month during a speech in Aurora, Colorado. It is my hope that we can put partisanship aside and that you will decide to join me in this effort.

As you may know, 20 states have adopted state constitutional amendments protecting victims' rights. Now it is time to extend these rights to every crime victim in America.

Last year, 43 million Americans were the victims of crime; nearly 11 million Americans were the victims of violent crime, such as murder, rape, and aggravated assault. Unfortunately, when the perpetrators of these vicious acts are finally caught and arrested, their victims are all too often marginalized by the criminal justice system. For example, crime victims are often forced to sit outside the courtroom during trials because they are witnesses. In many cases, they are unable to give information to the judge about setting bail. They are often kept in the dark, rarely being informed about the schedule of court proceedings or the entry of plea bargains. And once the trial starts, the focus is typically not on the crime victim, but on the rights and needs of the criminal defendant.

Quite simply, we must restore some balance to our criminal justice system. "Justice for all" must mean justice for the victims of crime and their families.

At the same time, a federal victims' rights amendment is more than just a phrase to be casually thrown about as political rhetoric. To be meaningful, it should guarantee the following basic rights:

* the right to be informed of, and given the opportunity to be present at, every relevant proceeding involving the accused or convicted offender;

* the right to be heard at any proceeding involving sentencing;

* the right to be informed of any release of, or escape by, the offender;

Authorized and paid for by Dole for President, Inc., Robert Lighthizer, Treasurer
810 First Street, Northeast • Suite 300 • Washington, D.C. 20002 • (202) 414-6400

* the right to object to a previously negotiated plea or a release from custody;

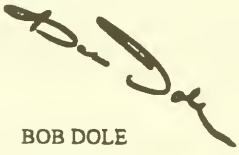
* the right to a speedy trial and a final conclusion of the case free from unreasonable delay;

* the right to restitution from the convicted offender; and

* the right to be protected from violence or intimidation by the accused or convicted offender.

Mr. President, I hope today's news reports are accurate. On behalf of the millions of Americans who are victimized by crime each year, I urge you to join me in supporting a meaningful victims' rights amendment to the United States Constitution.

Sincerely,



BOB DOLE

BOB DOLE FOR PRESIDENT

REMARKS PREPARED FOR DELIVERY
SENATOR BOB DOLE
MUNICIPAL JUSTICE CENTER
AURORA, COLORADO
TUESDAY, MAY 28, 1996

Thank you all very much. It's great to be here with all of you. I'm especially pleased to be with your outstanding attorney general, Gale Norton.

I'm honored to be joined today by so many fine men and women who have dedicated their careers to serving and defending the public. Those of us in the political world talk a lot about fighting crime, but you are on the front lines every day -- safeguarding our communities and protecting our streets. I salute each and every one of you.

Most Americans need little convincing that we have a crime problem of very serious dimensions in this country. When people say our country is headed in the wrong direction, one of the first things they cite is the explosion of crime.

I've seen America come through some tough challenges in my lifetime; we have a few more challenges ahead. I am hopeful because I know that whatever problems we face, Americans have what it takes to resolve them.

But I think there is a general feeling that in our criminal justice system, something has gone terribly wrong. We all know the problems.

More than 43 million of our fellow citizens are victims of crime each year; eleven million of these crimes are violent. But only 1 in 100 violent crimes ends in a jail sentence.

Yet when criminals are caught by police and brought to trial, they may never do time. Violent criminals are only 1/5th as likely to serve their full sentence as they were in the 1960s. Convicted rapists serve, on average, only five years in prison. Drug traffickers less than two.

Many Americans believe our criminal justice system is failing. And they are right.

Our two parties have embraced two very different visions of crime and punishment. Until fairly recently, the debate in America was about <u>how</u> to catch and punish wrongdoers, not <u>whether</u> to punish them or <u>whether</u> they were even wrongdoers. The debate was not about "root causes" and theories about rehabilitation. It was about right and wrong ... guilt and innocence. We believed killing is caused by killers, robbing by robbers, drug-dealing by drug dealers.

The liberal view is that crime and violence are not so much punishable offenses as

treatable disorders. But the liberal philosophy is not the solution to our crime problem. In fact, it's one of the sources of the problem.

And it's one of the reasons Bill Clinton will be remembered as a president who just didn't get it. He understands what he needs to say, but he just doesn't grasp what he needs to do.

Now last month, I caught some criticism for questioning Bill Clinton's judicial appointments. Democrats complained that I was trying to politicize the courts, as if the judicial philosophy a President brings into office was not an important factor in the minds of American voters. It seems that some believe our courts should be above public scrutiny or accountability. There were even those who said I should not make the importance of judicial appointments an issue in this campaign.

Well I heard their objections and I have a simple response: The motion is denied.

I believe one of the most important legacies any president can leave is who he appoints to the judiciary. We have term limits for presidents but not judges. They serve for life. They can touch American society for decades. Bill Clinton's legacy is already clear. It includes a startling number of appointees more faithful to liberal orthodoxy than to traditional notions of crime and punishment.

Take Harold Baer, the Clinton judge from New York who ruled that there was nothing suspicious about suspected drug dealers running away from the police, because, in his opinion, residents of the area would be reasonable to regard law enforcement as "corrupt."

Or Florida Supreme Court Justice Rosemary Barkett, who joined a dissenting opinion in a case involving a brutal, racially-motivated killing. The opinion declared: "This is not simply a homicide case, it is also a social awareness case." It went on to state that the murderer was motivated by the "pervasive illness of racial discrimination" and the victim was, in the murderer's eyes, only "a symbolic representative of the class causing the perceived injustices." Bill Clinton rewarded this judge with a seat on the Eleventh Circuit Court of Appeals, where she continues to press her liberal agenda.

Bill Clinton hates to have the harsh light of public scrutiny shined on his judicial appointments. He can't defend them, so he tries instead to change the subject. Well, I can guarantee you this: There will be no Judge Baers or Judge Barketts in a Dole Administration. Liberals intent on imposing their agendas from the bench should run for office; when I am President, only conservative judges need apply.

The President's record is no better when it comes to selecting federal prosecutors -- the individuals responsible for bringing criminals to justice.

When Bill Clinton took office, he fired every United States Attorney in the country -- an

act of partisanship unprecedented in American politics. He replaced them with his own appointees -- some of whom, like his judges, refuse to take a hard line when it comes to putting criminals behind bars.

Look at the shocking examples in California. As reported in the *Los Angeles Times*, one drug runner was caught bringing 158 pounds of cocaine into our country. She was released, the charges against her dropped by a Clinton prosecutor. Other drug smugglers were caught with 37,000 Quaalude tablets and 32 pounds of hallucination-inducing drugs. The Clinton U.S. Attorney apparently refused to prosecute them. Since 1994, more than 1,000 suspects caught smuggling drugs into the United States from Mexico were simply sent home, free to make another attempt to bring their poison across the border.

The list goes on. There's Clinton's U.S. Attorney in Phoenix, who refused to authorize a search warrant in a major two-year investigation to break up a child pornography ring. And the President's prosecutor in Miami, who got himself thrown out of a so-called adult entertainment club after allegedly biting one of the dancers. He resigned in disgrace.

Ladies and gentlemen, last week we learned about another disgrace. We found out that the President's top political advisor is also helping accused rapists beat the rap. The same PR consultant who has been helping Bill Clinton pose as a crime-fighter has been moonlighting for an accused rapist in Connecticut, advising the rapist's legal team on techniques for selecting an easy-going jury. No wonder they don't get it.

The truth is that if Bill Clinton had done more to fight crime, if he'd appointed people serious about fighting crime, he wouldn't need a high-priced PR man to help him with the issue. The single most important thing a president can do to fight crime is put crime-fighters in our court rooms -- both on the bench and at the prosecutor's desk. And when I am President, that is exactly what I will do.

This campaign is about the truth, and we are going to tell the truth about Bill Clinton's record. And when you search for the truth, what you discover is the President mistakes the promise for the deed. The Clinton crime policy comes to just that -- heavy on promises, light on accomplishments.

As a candidate, he pledged to put 100,000 more police on the streets. Who can argue with that goal? More police on the beat means greater security in our neighborhoods. But as with so many Clinton promises, there's a huge credibility gap between his rhetoric and his record.

So about two weeks ago, I called him on it. I pointed out that the real number of new police is only a fraction of what he promised. The White House didn't like that -- they never like it when they have to back up their rhetoric. One of the President's senior advisers told reporters -- and I quote -- "next week, 43,000 of the 100,000 cops will be on the street and funded." A few days later, Mr. Clinton's Attorney General backtracked and basically admitted I was right. Turns

out only 17,000 new officers are actually on the street.

Say one thing, do another. That's the Clinton record. And that is another reason I'm running for President.

Ladies and gentlemen, justice isn't just a theory -- it's a duty. It's not just another election-year pledge -- it's a sacred promise.

The stakes have never been higher.

Last year, the President proudly announced a slight one-year drop in the violent crime rate. In 1994, more than 23,000 people were murdered -- a decline of five percent. This was proof, he said, that "America is moving in the right direction."

Of course, any reduction in the number of murders is good news. But frankly, when 23,000 or so killings a year seems like good news, I think we're losing perspective. Twenty-three thousand Americans. That's the population of a small town, lost every year.

And there's something even that grim statistic doesn't tell us: The killings are getting more brutal, more ruthless and more random. Things are moving in the wrong direction: today, for the first time ever, most murders are committed by strangers to their victims. Ours is the age of violence without feeling, and guilt without remorse: the paroled child molester. The drive-by shooting. The "thrill shooting." "Wilding." The serial killer. The mail-bomber.

Women in America know better than anyone about the randomness and ruthlessness of crime. It is a shameful, national disgrace that nightfall has become synonymous with fear for so many of America's women. Why should our wives feel unsafe when they leave work in the evening? Why should our daughters be gripped with fear when they enter a shopping mall parking lot.

We have a mounting drug crisis as well, though the current Administration doesn't appear to have noticed. Presidents Ronald Reagan and George Bush were serious about solving the drug problem. A lot of people thought it couldn't be done, but it was -- marijuana use declined. Cocaine-related deaths -- down. Use of heroin and LSD -- down.

But here as well, things are moving in the wrong direction. The numbers are going back up. Teen drug use has nearly doubled since President Clinton took office. The spirit of the 60s has returned, with an Administration that has done almost nothing to fight drugs. They downgraded the Drug Czar's office and cut funding for interdiction. They slowed down the number of new narcotics prosecutions. To this day, the Administration's most memorable pronouncement on the drug issue came from his surgeon general, Joycelyn Elders. What was her drug policy? She said that drugs ought to be legalized.

There is another fact that should deeply concern us: our nation is in the midst of a juvenile crime wave. The murder rate among 14- to 17-year-olds more than doubled, rising 172 percent between 1985 and 1994. Thirty-five percent of all violent crime is now committed by offenders less than 20 years of age. It wasn't long ago that we started worrying about children having children. Today, we've arrived at yet another cultural milestone: children killing children. Juvenile arrests may double by the year 2010. Some of today's newborns will become tomorrow's 14-year-old killers -- "super predators," as the experts predict.

I won't pretend this is a simple issue. Too many children are born into circumstances few of us can imagine -- mean streets, loveless homes. These children are American citizens like the rest of us. Our leaders should never rest until we have found ways to reach out and offer hope to everyone.

At the heart of juvenile violence is the breakdown of the family -- the nucleus of civilization. Today more than 30 percent of our children are born into homes without fathers. In 15 years, under the current rate, the number will exceed 50 percent. No society that calls itself civilized can sustain this frightening trend.

At its best, government can help families. At its worst, it can hurt families, whether by taxing them too much or failing to deliver a quality education. But of all the wrong turns taken by big government, none has been a greater disaster than welfare. The system treats marriage, work, and personal responsibility as irrelevant. It has produced a culture of illegitimacy, dependency, and self-destruction.

Rebuilding the family is the best juvenile crime prevention program we could hope for. And we can start by reforming welfare. Last week, I announced a plan that will attack illegitimacy and drug use, and give people on welfare the tools they need to work their way out of dependency. Bill Clinton promised to "end welfare as we know it." Bob Dole is going to get the job done.

But there is a difference between compassion for those born into struggle and excuses for those who choose lives of crime and violence. President Clinton's answer to juvenile crime has included an array of social service programs. But fielding armies of well-meaning social workers is not the way to prevent violent crime.

I have spent some time focusing on President Clinton's crime record because I believe government has no higher responsibility than protecting its citizens. There are also few issues where the gap between Bill Clinton's rhetoric and his record is so profound.

But I also believe that those who would lead this nation must do more than just criticize -- we have an obligation to spell out the policies and principles we will use to guide our country and meet its challenges.

I have already discussed my commitment to appointing federal judges and prosecutors dedicated to fighting crime. Let me now tell you about policies I will implement as President to replace crime-fighting rhetoric with action.

Juvenile Justice Reform

Many of the rules of our juvenile justice system were designed when the worst offenses committed by teenagers included joy-riding and truancy. Fortunately, many states are now changing these rules, and revising their juvenile justice systems to reflect the violent realities of our time.

The federal government can help lead by example. We must amend the federal laws to ensure that juveniles who commit violent federal crimes are automatically prosecuted as adults. A violent teenager who commits an adult crime should be treated as an adult in court and should receive adult punishment. Teenagers who rape, rob and murder should not be automatically released when they turn 18 or 20. That's common sense, and it should be the law in every state in the land.

The records of violent juvenile offenders should be available to courts, law enforcement, and for the employment in sensitive jobs, such as daycare.

Closing the Gap Between Crime and Punishment

There are other steps we must take to protect the innocent people of this country.

We must close the gap between crime and punishment. That means ending parole for violent offenders. We've already abolished parole at the federal level; some states have done so as well. Now it's time to abolish parole all across America. About one in every three violent crimes is committed by someone out on parole, probation or pretrial release. There is no excuse for revolving-door justice. A convicted violent criminal should serve the full sentence.

As president, I will work with the governors to ensure that the states have the resources they need to keep violent criminals in prison where they belong. I've been asked, how much prison space do we need? My answer is as much as it takes to put space between hard core criminals and law-abiding Americans.

We must work to protect the public from further harm at the hands of the criminal population. Those now in the system -- whether in prison or on parole, probation, or pretrial release -- should be periodically tested for drugs and penalized further if they use them. As President, I will propose legislation requiring drug testing at every stage of the federal criminal justice system, with appropriate sanctions for those who fail these tests. And I will work with the governors to ensure that drug testing becomes the rule rather than the exception in their own state criminal justice systems.

We must make life tougher for rapists. We passed Megan's Law, which requires the states to establish registries and inform communities when there are convicted child molesters and other sex offenders in their midst. It's a good law, and it ought to be clarified to apply to all persons convicted of statutory rape or forcible rape. This is just common sense: Rapists released from prison are ten and a half times more likely to be arrested once again on a rape charge.

We must also crack down on those who produce and traffic in child pornography. Today, the federal penalties for child pornography are so lenient that some federal prosecutors choose to put the defendants on trial for state charges, because the penalties are tougher. The federal system must catch up with the tougher state laws on child pornography. Let's have a minimum of ten years for the first offense, 15 years for the second, and life for the third.

And we must not forget the victims of domestic violence. Men who commit violence against women in the home must understand that their behavior is not just a "family matter." It is our concern too. Domestic violence is as serious a crime as any crime in America today.

Legal Reform

Some reforms will touch the legal establishment itself. I have a high regard for many lawyers. And I do mean many -- America has five percent of the world's population but 70 percent of the world's lawyers. But the profession has some faults, which are very clear to the public. Despite the opposition of the American Bar Association and their liberal allies, the Republican Congress succeeded in reforming the death penalty appeals process, so death row inmates no longer can delay their sentences with years and years of often frivolous petitions. It took more than a decade to fix the death penalty appeals process. But it was worth fighting for, because no family should have to wait five, ten, or fifteen years until the person who killed their loved one is finally punished. Justice delayed is justice denied.

And, yes, there is more to do. A criminal trial should be devoted to finding the truth. Too often trials turn into a game played by lawyers who seek to manipulate the rules and use technicalities to hide the truth from the jury. But when key evidence is excluded from a trial on a technicality, the victim of crime becomes a victim once again. I'm for due process, but I'm also for due justice. Evidence should not be kept out of a trial when the police have acted in good faith.

Victims' Rights

We must spend more time looking out for the rights of victims rather than trying to find new rights to give to criminals. Everyone charged with a sex offense should be taken in for an HIV test and the results released to the victim.

We've already tightened the federal rules of evidence to ensure that past acts of sexual abuse are admissible in court. The states should follow this example.

And we should pass and ratify an amendment to the Constitution giving crime victims some basic rights, including the right to appear and stay informed of proceedings involving their victimizers. At least 20 states already have state constitutional amendments protecting victims' rights. Let's extend those rights to every crime victim in America.

The president must be on the side of the victims. He must use the bully pulpit of the White House to bring Americans together against criminals of every kind, whether it's drug dealers, scam artists, killers on the streets, or those perpetrating new forms of terror -- such as the recent epidemic of fires at African American churches in the rural South. These hate crimes are wrong, they are evil, and they have no place in the United States of America.

My friends, for years now, you and I have been told that society must bend over backwards to defend the rights of criminals, because that's the price we have to pay for living in freedom.

Well, I know a thing or two about the price of freedom, and so do many here today. As with most problems, I tend to view crime and violence through the eyes of a veteran. And when I think about the violence in America, I think about the young men and women we as a nation honored yesterday -- those who went overseas to serve their country, and never had the chance to live out their dreams and raise families of their own.

They did not go off to fight tyranny abroad so that America could one day fall under a tyranny of violence at home. They fought for an America where people who live by the rules could lead full lives without fear of violence.

I think also of the woman and the two men honored by this memorial, with the eloquent reminder that "It is not how these officers died that made them heroes: it is how they lived."

They lived to fulfill a mission: to make this community a safer place; to secure justice; uphold the rule of law; and protect their families, friends, neighbors, and people whose names they did not even know.

We honor their memory by continuing their mission. That's what the crime issue is all about. It's about hard-fought freedoms we must never surrender to common criminals or arrogant judges. It's about lives we can spare and neighborhoods we can still save. It's about a country where justice and compassion go hand in hand. It's about an America where evil is punished, and innocence has nothing to fear; a decent, peaceful country where every child can once again play in safety -- protected by the full majesty of the law.

Thank you very much, and God bless America.

LETTER FROM LAW PROFESSORS REGARDING THE PROPOSED VICTIM'S RIGHTS CONSTITUTIONAL AMENDMENT

September 4, 1996

The Honorable Orrin Hatch
Chairman
The Honorable Joseph R Biden, Jr.
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Henry Hyde
Chairman
The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Senators Hatch and Biden, and Representatives Hyde and Conyers:

We are law professors and practitioners who oppose the recent proposals to add a "Victim's Rights" Amendment to the United States Constitution (S.J. Res. 52, H.J. 173 & 174, subsequent proposed "Draft Joint Resolutions"). Although we commend the desire to help crime victims, we also believe amending the Constitution to do so is both dangerous and unnecessary. Although there are specific proposals, our opposition is more general as well. Our Constitution should not be amended unless there is a pressing need to do so, and no such necessity exists in this instance.

A Victim's Rights" Amendment, if adopted, would signify a radical break with over two hundred years of understanding and practice. It is dangerous because it would significantly alter the balance between state and federal power over criminal justice matters. It would drastically transform our constitutional commitment to protecting individuals against the State. It is unnecessary because many of the specific provisions listed in current versions of the proposed amendment already exist under statutes and state constitutions. Further, the amendment could impose substantial costs on states and the federal courts. Support for crime prevention, not more federal government intrusion on the states' traditional power, is the real solution to the problem of victimization.

The amendment is completely unnecessary to give states power to give victims rights. Law enforcement and criminal law have always been considered one of the primary powers reserved by the Constitution to the states, subject to certain limitations imposed by the Bill of Rights. States have not ignored the significant voice of victims in state legislatures, which have been responsive to victims' concerns in enacting criminal and sentencing laws, as well as laws specifically designed to assist victims. Although "only" about twenty states have state constitutional provisions for "victim's rights," almost all states already have statutes providing for some victim participation in sentencing proceedings, and/or restitution to victims. A "Victim's Rights" amendment would subject

these state laws regarding crime victims, as well as state laws defining crimes and sentences, to federal oversight.[1]

The proponents of the amendment argue the need to "balance" the rights of the victim against the constitutional rights of the accused, but our criminal law serves the public interest in assuring justice for all people. It is the government, not the victim, which declares what is or is not a crime, prosecutes criminal offenses, and imprisons and executes persons. The Bill of Rights was adopted precisely to protect individuals, however unpopular, from governmental abuses and to preserve liberty. The vast majority of individuals charged with a crime are at a distinct disadvantage in terms of resources, power, and ability to defend themselves against the government. Invoking the very real concerns of victims of crime to amend the Constitution in a manner that could substantially undermine fundamental protections for individuals against unreasonable governmental intrusions, including protections against arbitrary taking of liberty, property, life, and forced confessions, threatens our commitment to individual rights. Derivative rights, such as the presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt, have worked to ensure that only the guilty are punished. If alleged and actual victims of crime are given a constitutional right to "justice," as under S.R. 52, or to a "final conclusion free from unreasonable delay," as under both proposals, such textual rights could override these historical protections against wrongful imprisonment and conviction of the innocent.

The direct and indirect costs of an amendment could be enormous. Either version of the amendment creates vast uncertainties and conflicts that legislatures and courts would have to address, resulting in more, not less, uncertainty in the criminal justice process. The courts, already overburdened with criminal cases, would need additional judges and personnel. Crime victims who cannot afford attorneys certainly would argue that they have a right to court-appointed counsel to assist them in exercising their rights, just as defendants do now. If crime victims have a right to be heard in any proceeding affecting "custody," even routine hearings could become complex and time consuming. Conflicts between defendants' rights and victims' rights—the right to a "speedy trial" or "final resolution free from unreasonable delay," for example—would increase litigation and appeals.

If crime victims exercise the right to object to a plea bargain under S.R. 52, they could force prosecutors to try cases even if the evidence cannot support the original charges. Other victims might insist on bargains that are too lenient. Pressure for speedy trials and final resolutions could force prosecutors to try cases before they have adequate

---

1 A "Victim's Rights" amendment could invalidate numerous state laws and would require extensive law revision at the local and state level. State laws regarding probation, parole, pretrial detention, plea bargaining, intimidation, and stalking, and other laws would all be subject to constitutional challenge or federal regulation. State victim-offender mediation programs might violate the right to full restitution, as would state statutes that provide for restitution to the extent possible. Other flexible, local responses meant to address specific needs or concerns could also be foreclosed if there is a constitutional amendment.

evidence to convict an accused and place pressures on trial and appellate courts to reach decisions without due deliberation. Further, both S.R. 52 and the Draft create substantial difficulties in identifying who is properly a victim and what remedies, if any, victims have if their rights are violated. While S.R. 52 would probably allow victims to sue for damages for deprivation of rights under color of state law, the Draft explicitly excludes such damages, arguably leaving victims without a meaningful remedy for violation of the right to protection and few, if any, remedies for violations of other rights enumerated in the Draft.[2]

Congress has a special historical, legal, and political responsibility to be cautious and deliberate in amending the Constitution. Even where deep concern about a specific issue exists, the Constitution ought not be amended without careful consideration of the alternatives. Abundant alternatives exist here: Congress and the states already have helped and can continue to help crime victims through statutes. All can demonstrate compassion and concern for victims without an ill-advised amendment. We urge you not to support adding a "Victim's Rights" amendment to the United States Constitution.

Sincerely,

* *Institutional Affiliations Listed for Identification Purposes Only.*

Professor Lynne Henderson
Indiana University--Bloomington

Mr. Richard Abel
McConnell Professor
UCLA School of Law

Professor George J. Alexander
School of Law, Santa Clara University

Professor Larry Alexander
University of San Diego School of Law

---

[2] Crime victims who believe their rights are infringed or impaired certainly might seek injunctions against courts, prosecutors, and legislatures to enforce their rights, causing confusion, delay, and potential interference with the administration of justice as well as the democratic process. Under S.R. 52, if victims do not feel that they have been treated with dignity and respect, have not been adequately protected by the police, or have not received what they believe is "justice," they arguably could sue for deprivation of civil rights under color of state law. But under the Draft, see section 2, victims have no right to damages, even if they do not receive "reasonable protection" from further harm by the offender, nor would victims have "grounds" . . . "to challenge a charging decision or a conviction," even though these obviously affect the rights to be heard regarding pleas. release from custody, length of sentence, etc. If nothing else, these conflicts reflect considerable confusion on why an amendment is necessary and what purpose it would serve.

Professor Ronald Jay Allen
Northwestern University School of Law

Mr. Albert W. Alschuler
Wilson-Dickinson Professor
University of Chicago Law School

Professor Scott Altman
University of Southern California Law Center

Mr. Alfred C. Aman
Dean and Professor
School of Law, Indiana University--Bloomington

Mr. Anthony G. Amsterdam
Judge Edward Weinfeld Professor and Director Lawyering Program
NYU School of Law

Assistant Professor Keith Aoki
University of Oregon School of Law

Professor Peter Arenella
University of California at Los Angeles School of Law

Professor Barbara Allen Babcock
Stanford Law School

Professor Susan Bandes
DePaul University School of Law

Professor Stephen Barnett
University of California (Berkeley) Boalt Hall

Professor Katherine T. Bartlett
Duke University School of Law

Professor Robert Batey
Stetson University School of Law

Assistant Professor Theresa M. Beiner
University of Arkansas-Little Rock School of Law

Professor Susan Bennett
American University, Washington College of Law

Professor Curtis Berger
Columbia Law School

Professor Vivian Berger
Columbia University School of Law

Professor Barbara E. Bergman
University New Mexico School of Law

Professor Guyora Binder
SUNY-Buffalo School of Law

Professor John Charles Boger
University North Carolina School of Law

Assistant Professor Anthony Bornstein
American University, Washington College of Law

Professor Cynthia Grant Bowman
Northwestern University School of Law

Professor Shirley Brandman
American University, Washington College of Law

Associate Professor William J. Bridge
SMU School of Law

Professor Karen B. Brown
University of Minnesota School of Law

Professor Kenneth S. Brown
University North Carolina School of Law

Professor Mark R. Brown
Stetson University School of Law

Professor Penelope Bryan
University of Denver College of Law

Professor John M. Burkoff
University of Pittsburgh School of Law

Associate Professor Scott Burris
Temple University School of Law

Professor Robert Calhoun
Golden Gate Law School

Mr. Paul D. Carrington
Harry R. Chedwick, Senior Professor Chair
Dul e University School of Law

Professor Erwin Chemerinsky
Legion Lex Professor
University of Southern California Law School

Assistant Professor Donna Coker
University Miami School of Law

Professor David A. Cole
Georgetown University Law Center

Professor James E. Coleman
Duke University School of Law

Professor Daniel O. Conkle
School of Law, Indiana University--Bloomington

Professor Mary Coombs
University Miami School of Law

Professor John Copacino
Georgetown University Law Center

Professor James D. Cox
Duke University School of Law

Ms. Cathy Crosson
Instructor
Indiana University--Bloomington

Assistant Professor David Cruz
University of Southern California Law Center

Professor Jerome McCristal Culp
Duke University School of Law

Ms. Angela J. Davis
Visiting Associate Professor
Washington College of Law, American University

Professor Peter Davis
Touro College Law Center

Professor Connie De La Vega
School of Law, University of San Fransisco

Professor John Denvir
School of Law, University of San Fransisco

Professor Alan Dershowitz
Harvard Law School

Professor Robert Dinerstein
American University, Washington College of Law

Professor Joshua Dressler
University of the Pacific, McGeorge School of Law

Mr. Robert F. Drinan, S.J.
Professor
Georgetown University Law Center

Professor Steven B. Duke
Yale Law School

Professor M. Bruce Duthu
Vermont Law School

Professor Fernand N. Dutile
Notre Dame University Law School

Professor Deborah Epstein
Georgetown University Law Center

Professor Julian Eule
University of California at Los Angeles School of Law

Professor Stephen M. Feldman
University of Tulsa School of Law

Professor Catherine Fisk
Loyola of Los Angeles Law School

Professor Eric M. Freedman
Hofstra University School of Law

Professor Lawrence M. Friedman
Stanford Law School

Ms. Lynda Frost
Assistant Professor, University of Virginia Law School
Professor, Institute of Law, Psychiatry, and Public Policy, University of Virginia

Professor Mary Ellen Gale
Whittier College of Law

Ms. Barbara J. Gilchrist
Associate Clinical Professor
St. Louis University School of Law

Professor Daniel Givelber
Northeastern University School of Law

Professor Donald Gjerdingen
School of Law, Indiana University--Bloomnigton

Miye Goishi
Clinical Attorney, Civil Justice Clinic
Hastings College of the Law

Professor David Goldberger
Ohio State University School of Law

Associate Professor Phyllis Goldfarb
Boston College Law School

Professor Robert D. Goldstein
UCLA School of Law

Professor Gary S. Goodpaster
University of California Davis School of Law

Professor Jeffrey N. Gordon
Columbia Law School

Professor Stephen Gottlieb
Albany Law School

Professor Kenneth W. Graham
University of California at Los Angeles School of Law

Professor Michael Green
University of Iowa College of Law

Professor Edwin Greenebaum
Indiana University--Bloomington School of Law

Professor Tom Grey
Stanford Law School

Professor Samuel R. Gross
University of Michigan School of Law

Mr. Martin Guggenheim
Professor and Director of Clinic and Advocacy Program
NYU School of Law

Professor Gerald Gunther
Stanford Law School

Professor Gwen Thayer Hadelman
Washington and Lee University School of Law

Professor Janet Halley
Stanford Law School

Professor David Harris
University of Toledo College of Law

Professor Susan N. Herman
Brooklyn Law School

Professor Randy Hertz
NYU School of Law

Mr. Joseph Hoffmann
Professor and Associate Dean
School of Law, Indiana University--Bloomington

Associate Professor Sarah J. Hughes
School of Law, Indiana University--Bloomington

Associate Professor Steve Johnson
School of Law, Indiana University--Bloomington

Professor John Junker
University Washington School of Law

Professor Kenneth Karst
University of California at Los Angeles School of Law

Professor Mark G. Kelman
Stanford LawSchool

Professor Kit Kinports
University of Illinois School of Law

Professor Richard Klein
Touro College Law Center

Ms. Ellen Kreitzberg
Associate Professor and Director Trial and Appellate Advocacy Program
Santa Clara University School of Law

Mr. Paul M. Kurtz
Associate Dean and J. Alton Hosch Professor
University of Georgia School of Law

Mr. Richard Leo
Adjunct Professor, School of Law
Assistant Professor of Sociology, University of Colorado

Professor Leon Letwin
University of California at Los Angeles School of Law

Visiting Professor John Leubsdorf
Rutgers-Newark School of Law

Mr. David I. Levine
Hastings College of Law

Professor Jerome Levinson
American University, Washington College of Law

Ms. Holly Maguigan
Professor of Clinical Law
NYU School of Law

Ms. Carolyn McAllaster
Lecturer
Duke University School of Law

Professor Miguel A. Mendez
Stanford Law School

Mr. Roy M. Mersky
Atlas Family Centennial Professor and Director of Research
University of Texas at Austin School of Law

Professor Binny Miller
American University, Washington College of Law

Professor Elliott Milstein
American University, Washington College of Law

Mr. Ralph James Mooney
Kaapke Professor
University of Oregon School of Law

Professor Martha Morgan
University of Alabama School of Law

Professor Herbert Morris
University of California at Los Angeles School of Law

Professor Robert Mosteller
Duke University School of Law

Professor Joel S. Newman
Wake Forest University School of Law

Ms. Theresa Newman
Lecturer
Duke University School of Law

Professor Nell Newton
American University, Washington College of Law

Mr. James M O'Fallon
Frank Nash Professor
University of Oregon School of Law

Professor Charles J. Ogletree
Harvard Law School

Associate Professor David Oppenheimer
Golden Gate University School Of Law

Associate Professor Aviva Orenstein
Indiana University--Bloomington School of Law

Professor Richard L. Ottinger
Pace University School of Law

Associate Professor Victoria Palacios
SMU School of Law

Assistant Professor Margaret L. Paris
University of Oregon School of Law

Ms. Cynthia J. Reichard
Associate Director, Legal Research and Writing
Indiana University--Bloomington School of Law

Professor Deborah Rhode
Stanford Law School

Professor Richard A. Rosen
University North Carolina School of Law

Professor Arthur Rosett
University of California at Los Angeles School of Law

Mr. Thomas D. Rowe, Jr.
Elvin R Latty Professor
Duke University School of Law

Judge Stephen W. Russell

Professor F. Thomas Schornhorst
Indiana University--Bloomington School of Law

Mr. David Schuman
Associate Dean and Associate Professor
University of Oregon School of Law

Professor Louis Michael Seidman
Georgetown University Law Center

Professor Ann C. Shalleck
American University, Washington College of Law

Professor Gary M. Shaw
Touro Law Center

Professor Melvin Shimm
Duke University School of Law

Professor Marjorie A. Silever
Touro University Law Center

Professor William Simon
Stanford Law School

Professor Abbe Smith
Georgetown University Law Center

Professor Girardeau A. Spann
Georgetown University Law Center

Assistant Professor Susan J. Stabile
St. John's University School of Law

Professor Irwin P. Stotzky
University of Miami School of Law

Professor J. Alexander Tanford
Indiana-Bloomington School of Law

Professor David Tarbert
Assistant Professor, SMU School of Law
Director, Criminal Justice Clinic

Associate Professor Kim Taylor-Thomson
Stanford Law School

Mr. Anthony Thompson
NYU School of Law

Professor Mary Twitchell
University of Florida College of Law

Professor William Van Alstyne
William and Thomas Perkins Professor
Duke University School of Law

Professor Eugene Voloch
University of California at Los Angeles School of Law

Associate Professor Heathcote W. Wales
Georgetown University

Professor Burton Wechsler
American University, Washington College of Law

Professor Robert Weisberg
Stanford Law School

Mr. Charles D. Weisselberg
Clinical Professor
University Southern California Law Center

Mr. Harry Wellington
Dean and Professor
New York Law School

Professor Robin West
Georgetown University Law Center

Professor Welsh S. White
University Pittsburg School of Law

Professor Stephanie Wildman
School of Law University of San Fransisco

Professor David Williams
School of Law, Indiana University--Bloomington

Professor Susan H. Williams
Indiana University--Bloomington School of Law

Professor Larry W. Yackle
Boston University School of Law

Mr. Steven Zeidman
Assistant Professor of Clinical Law
NYU School of Law

Ms. Mary Marsh Zulach
Clinical Professor
Columbia University School of Law

cc: Members of the United States Senate
Members of the Unites States House of Representatives

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Ralph S. Tyler, Jr. Professor of Constitutional Law

HAUSER HALL 420
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

Via Fax and Federal Express

September 11, 1996

The Honorable Orrin Hatch
Chairman
The Honorable Joseph R. Biden, Jr.
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20501

The Honorable Henry Hyde
Chairman
The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Senators Hatch and Biden and Representatives Hyde and Conyers:

I have read the letter from law professors, dated September 4, 1996, attacking the proposed Victim's Rights Constitutional Amendment. Although I share many of the broad views set forth in the letter — including the views that the Constitution should not be amended without a strong need and that the constitutional rights of persons accused of crime should not be sacrificed in order to serve other values — I do not believe the letter makes a convincing or even a coherent case for its ultimate conclusions. The case for the proposed amendment need not rest on some nebulous notion that the playing field must be balanced as between criminal defendants and crime victims. It rests on the twin propositions (1) that victims have important human rights that can and should be guaranteed protection without endangering the genuine rights of those accused or convicted, but (2) that attempts to protect these rights of victims at the state level, or through congressional legislation, have proven insufficient (although helpful) in light of the concern — recurring even if misguided — that taking victims' rights seriously, even when state or federal statutes or state constitutions appear to require doing so, will somehow be unfair to the accused or to others *even when no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested.* The proposed amendment would, in essence, counteract this problem.

If and when the proposed amendment is reported out of committee for floor debate, I will prepare a rejoinder to the professors' letter, taking into account the specific language that the Senate and House Committees ultimately recommend. Indeed, I wish I had the time even now to address in greater detail the points made in that letter — both the points explaining the authors' general opposition to the idea of any such amendment, and the points elaborating the authors' misgivings

about what they evidently assume the amendment will say. But other commitments preclude my doing so at this time; and, in any event, the professors' letter is obviously directed at a proposal that differs in various relevant details from the latest draft of which I am aware, and it would make much more sense for me to respond to objections that have taken into account what your respective committees recommend to Congress than to respond to objections that quite transparently miss the mark.

In the meantime, I am taking the liberty of attaching a brief memorandum dated June 27, 1996, that I prepared well before the most recent round of drafting took place, on the broad topic of why an amendment along these lines ought to be adopted, and why the standard objections (that states have ample authority to protect victims without this amendment, that Congress could also do so by simple legislation, that the amendment would endanger the rights of defendants and the needs of law enforcement, etc.) are superficially plausible but ultimately misguided. Please feel free to make whatever use you wish of that memorandum and of this letter.

Sincerely yours,

Laurence Tribe

Laurence H. Tribe

Enc.

cc: Senator Dianne Feinstein
Senator Jon Kyl

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Ralph S. Tyler, Jr. Professor of Constitutional Law

HAUSER HALL 420
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

Victims' Rights

Laurence H. Tribe.
June 27, 1996

Beginning with the premise that the Constitution should not be amended lightly and should never be amended to achieve short-term, partisan, or purely policy objectives, I would argue that a constitutional amendment is appropriate only when the goal involves (1) a needed change in government structure, or (2) a needed recognition of a basic human right, where (a) the right is one that people widely agree deserves serious and permanent respect, (b) the right is one that is insufficiently protected under existing law, (c) the right is one that cannot be adequately protected through purely political action such as state or federal legislation and/or regulation, (d) the right is one whose inclusion in the U.S. Constitution would not distort or endanger basic principles of the separation of powers among the federal branches, or the division of powers between the national and state governments, and (e) the right would be judicially enforceable without creating open-ended or otherwise unacceptable funding obligations.

I believe that a properly drafted victims' rights amendment would meet these criteria. The rights in question — rights of crime victims not to be victimized yet again through the processes by which government bodies and officials prosecute, punish, and release the accused or convicted offender — are indisputably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate. To protect these rights of victims does not entail constitutionalizing the rights of private citizens against other private citizens; for it is not the private citizen accused of crime by state or federal authorities who is the source of the violations that victims' rights advocates hope to address with a constitutional amendment in this area. Rather, it is the government authorities themselves, those who pursue (or release) the accused or convicted criminal with insufficient attention to the concerns of the victim, who are sometimes guilty of the kinds of violations that a properly drawn amendment would prohibit.

Pursuing and punishing criminals makes little sense unless society does so in a manner that fully respects the rights of their victims to be accorded dignity and respect, to be treated fairly in all relevant proceedings, and to be assured a meaningful opportunity to observe, and take part in, all such proceedings. These are the very kinds of rights with which our Constitution is typically and properly concerned. Specifically, our Constitution's central concerns involve protecting the rights of individuals to participate in all those government processes that directly and immediately involve those individuals and affect their lives in some focused and particular way. Such rights include the right to vote on an equal basis whenever a matter is put to the electorate for resolution by voting; the right to be heard as a matter of procedural due process when government deprives one of life, liberty, or property; and various rights of the criminally accused to a speedy and public

trial, with the assistanc of counsel, and with various other participatory safeguards including the right to compulsory process and to confrontation of adverse witnesses. The parallel rights of victims to participate in these proceedings are no less basic, even though they find no parallel recognition in the explicit text of the U.S. Constitution.

Courts have sometimes recognized that the Constitution's failure to say anything explicit about the right of the victim or the victim's family to observe the trial of the accused should not be construed to deny the existence of such a right — provided, of course, that it can be respected consistent with the fair-trial rights of the accused. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), for example, the plurality opinion, written by Chief Justice Burger, noted the way in which protecting the right of the press and the public to attend a criminal trial — even where, as in that case, the accused and the prosecution and the trial judge all preferred a closed proceeding — serves to protect not only random members of the public but those with a more specific interest in observing, and right to observe — namely, the dead victim's close relatives. *See* 448 U.S. at 571 ("Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done — or even the urge for retribution."). Although the Sixth Amendment right to a public trial was held inapplicable in *Richmond Newspapers* on the basis that the Sixth Amendment secures that right only to the accused, and although the First Amendment right to free speech was thought by some (*see, e.g.*, 448 U.S. at 604-06 (Rehnquist, J., dissenting)) to have no direct bearing in the absence of anything like government censorship, the plurality took note of the Ninth Amendment, whose reminder that the Constitution's enumeration of explicit rights is not to be deemed exclusive furnished an additional ground for the plurality's conclusion that the Constitution presupposed, even though it nowhere enumerated, a presumptive right of openness and participation in trial proceedings. *See* 448 U.S. at 579-80 & n.15 ("Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.").

I discuss *Richmond Newspapers* in some detail here not just because I argued that case but because it illustrates so forcefully the way in which victims' rights to observe and to participate, subject only to such exclusions and regulations as are genuinely essential to the protection of the rights of the accused, may be trampled upon in the course of law enforcement simply out of a concern with administrative convenience or out of an unthinking assumption that, because the Constitution nowhere refers to the rights of victims in so many words, such rights may and perhaps even should be ignored or at least downgraded. The happy coincidence that the rights of the victims in the *Richmond Newspapers* case overlapped with the First Amendment rights of the press prevented the victims in that case — the relatives of a hotel manager who had been found stabbed to death — from being altogether ignored on that occasion. But many victims have no such luck, and there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach, *not* on the entirely understandable basis of a particularized determination that affording the victim the specific right claimed would demonstrably violate some constitutional right of the accused or convicted offender, but on the very different basis of a barely-

considered reflex that protecting a victim's rights would represent either a luxury we cannot afford or a compromise with an ignoble desire for vengeance.

As long as we do so in a manner that respects the separation and division of powers and does not invite judges to interfere with law enforcement resource allocation decisions properly belonging to the political branches, we should not hesitate to make explicit in our Constitution the premise that I believe is implicit in that document but that is unlikely to receive full and effective recognition unless it is brought to the fore and chiseled in constitutional stone — the premise that the processes for enforcing state and federal criminal law must, to the extent possible, be conducted in a manner that respects not only the rights of those accused of having committed a crime but also the rights of those they are accused of having victimized.

The fact that the States and Congress, within their respective jurisdictions, already have ample affirmative authority to enact rules protecting these rights is a reason for not including new *enabling* or *empowering* language in a constitutional amendment on this subject, but is not a reason for opposing an amendment altogether. For the problem with rules enacted in the absence of such a constitutional amendment is not that such rules, assuming they are enacted with care, would be struck down as falling outside the affirmative authority of the relevant jurisdiction. The problem, rather, is that such rules are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened.

Of course any new constitutional language in this area must be drafted so that the rights of victims will not become an excuse for running roughshod over the rights of the accused. Any constitutional amendment in this field must be written so that courts will retain ultimate responsibility for harmonizing, or balancing, the potentially conflicting rights of all participants in any given case. But assuring that this fine-tuning of conflicting rights remains a task for the judiciary should not be too difficult. What is difficult, and perhaps impossible, is assuring that, under the existing system of rights and rules, the constitutional rights of victims — rights that the Framers of the Constitution undoubtedly assumed would receive fuller protection than has proven to be the case — will not instead receive short shrift.

To redress this imbalance, and to do so without distorting the Constitution's essential design, it may well be necessary to add a corrective amendment on this subject. Doing so would neither extend the Constitution to a purely policy issue, nor provide special benefits to a particular interest group, nor use the heavy artillery of constitutional amendment where a less radical solution is available. Nor would it put the Constitution to a merely symbolic use, or enlist it for some narrow or partisan purpose. It would instead, if the provision were properly drafted, help solve a distinct and significant gap in our existing legal system's arrangements for the protection of basic human rights against an important category of governmental abuse.

The Stephanie Roper Committee, Inc.

14804 Pratt Street #1, Upper Marlboro, Maryland 20772
Phone: (301) 952-0063 / FAX: (301) 952-2319

July 16, 1996

Honorable Henry Hyde, Chairman
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Bldg.
Washington, DC 20515-6216

Dear Chairman Hyde:

I was honored to testify in support of the federal constitutional amendment for crime victims' rights on July 11, 1996. Thank you for inviting me to share my experiences, both as a victim/survivor and as an advocate for the need for this amendment.

All of us welcomed the opportunity to have this important dialogue before the Committee on the Judiciary. I do, however, have some personal concerns that I wish to share with you as a result of the questions directed to the victim panel. Because of the diversity of our experiences and the presence and absence of statutory and constitutional rights in our respective states, the answers we gave may have created additional questions. In my view howeve , they demonstrate the need for a federal amendment that will clarify and protect certain fundamental rights for victims of crime in every state in our nation.

I commend your understanding and eloquence in regard to the nature of a constitutional amendment. In Maryland, we succeeded with an amendment that is a basic statement of core values that can stand on its own, but is implemented through enabling legislation.

Consequently, the issue of HIV testing, in my view, is one that should be and is being addressed by statutes in many states (see Maryland law, Article 27, Section 855). The issue of enforcement remedies is very important; however, I believe that it is not about the ability to sue for monetary damages. There may be several possible remedies that include: requesting the trial judge to determine the right; relief by leave to appeal, certiorari, mandamus, etc.. While in Maryland, this relief has only been utilized on behalf of victims in a couple of cases, it has enabled the victims to test the law.

The attorney who is the lobbyist and legal counsel for our organization and for Maryland's amendment offers his assistance as we proceed in resolving the language of the amendment. His name is Russell P. Butler, Esq. and he may be reached at (301) 423-7500.

"one person can make a difference and every person should try---"

Stephanie Roper

In regard to previous communication with you about restitu ion, and your request for information to improve the collection of restitution, I am enclosing some materials we have obtained. We believe that much can be learned from the Office of Child Support and Enforcement. They have been successful in collecting past-due child support through a Federal income Tax Refund Offset program that has resulted in nationwide collections of over $685 million dollars in FY 1994. I am enclosing pages from the CHILD SUPPORT ENFORCEMENT ANNUAL REPORT TO CONGRESS, 1994, in regard to the Social Security Amendments of 1994, and the Federal Parent Locator Service. Also enclosed is a 1991 discussion draft introduced by Maryland Congressman Hoyer who was approached at that time to explore remedies.

We hope this information will be helpful to you. Obviously, we need federal authority to proceed if restitution collections are to improve.

Thank you for your assistance in this matter, and for your leadership on behalf of the crime victims' amendment. We can have a criminal justice system that respects and protects the rights of crime victims, and ensures a fair trial to those accused of crime. I look forward to hearing from you.

Sincerely,

Roberta Roper

Roberta Roper
Director

Child Support Enforcement Nineteenth Annual Report to Congress

For the Period Ending September 30, 1994

19

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Administration for Children and Families
Office of Child Support Enforcement
(202) 401-9383

For contested paternity cases, the regulation requires States to have a variety of procedures to streamline the establishment process. States must also have procedures requiring the entry of default orders in paternity cases upon a showing that process was served on the defendant and that the defendant failed to respond in accordance with State procedures.

In interstate cases, the rule requires a State to give full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes.

Under the new expedited process requirements, within 90 calendar days of locating the alleged noncustodial parent, the IV-D agency must establish an order for support or complete service of process (or document unsuccessful attempts to serve process). The IV-D agency must resolve 75 percent of all pending cases in 6 months and 90 percent in 12 months.

THE FEDERAL PARENT LOCATOR SERVICE and OTHER FEDERAL SYSTEMS

The Federal government provides a computerized national network operated by OCSE to provide States access to information on a noncustodial parent's location, earnings, assets, and employer's address. The key components of this network are described below.

Federal Parent Locator Service

The Federal Parent Locator Service (FPLS) provides Social Security Numbers (SSNs), addresses, and employer and wage information to State and local CSE agencies to establish and enforce child support orders. The FPLS utilizes the most current information available from the Internal Revenue Service, Social Security Administration, National Personnel Records Center (NPRC), Department of Defense (DOD), Department of Veterans Affairs, Selective Service System (SSS), and State Employment Security Agencies.

HOYER001

HLC

[DISCUSSION DRAFT--10/3/91]

102D CONGRESS
1ST SESSION

H. R. ___

IN THE HOUSE OF REPRESENTATIVES

Mr. HOYER introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Internal Revenue Code of 1986 to allow refunds of Federal income taxes to be diverted to victims of crime where restitution payments required to be made under Federal or State law are determined to be in arrears.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DIVERSION OF REFUNDS WHERE REQUIRED RESTITUTION PAYMENTS ARE IN ARREARS.

(a) IN GENERAL.--Section 6402 of the Internal Revenue Code of 1986 (relating to authority to make credits or refunds) is amended by redesignating subsections (e) through (i) as subsections (f) through (j), respectively, and by inserting after subsection (d) the following new subsection:

``(e) OFFSET OF PAST-DUE REQUIRED RESTITUTION PAYMENTS AGAINST OVERPAYMENTS.--

``(1) IN GENERAL.--If, pursuant to such procedures as the Secretary may by regulations prescribe, the Secretary is notified by an appropriate Federal or State restitution enforcement agency that a named person owes a past-due restitution obligation under Federal law or the laws of such State, as the case may be, which has been assigned for collection by such agency, the Secretary shall--

``(A) reduce the amount of any overpayment payable to such person by the amount of such obligation,

``(B) pay the amount by which such overpayment is reduced under subparagraph (A) to such agency for payment to the individual or individuals to which such obligation is owed, and

``(C) notify the person making such overpayment that such overpayment has been reduced under this subsection.

``(2) PAST-DUE RESTITUTION OBLIGATION.--For purposes of this subsection, the term `past-due restitution obligation' means the amount of a delinquency, determined under a court order or an order of an administrative process established under Federal or State law, for court-ordered restitution to the victim of any crime under Federal or State law by the person convicted of such crime.

``(3) PRIORITIES OF OFFSET.--Any overpayment by a person shall be reduced pursuant to this subsection after such overpayment is reduced pursuant to subsections (c) and (d) and before such overpayment is credited to the future liability for tax of such person pursuant to subsection (b).

``(4) STATE MUST HAVE SIMILAR OFFSET PROGRAM.--Paragraph (1) shall apply to a past-due restitution obligation of any person under the laws of a State only if

``(A) procedures similar to those described in paragraph (1) are in effect in such State with respect to State tax overpayments of such person, and

``(B) such obligation has been submitted to the

tax collection agency of such State for collection under such procedures.''

(b) TECHNICAL AMENDMENTS.--

(1) Paragraph (2) of section 6402(d) of such Code is amended by inserting ``is reduced pursuant to subsection (e) or'' before ``is credited''.

(2) Subsection (f) of section 6402 of such Code, as redesignated by subsection (a), is amended by striking ``(c) or (d)'' and inserting ``(c), (d), or (e)''.

(3) Subsection (h) of section 6402 of such Code, as redesignated by subsection (a), is amended by striking ``subsection (c)'' and inserting ``subsection (c) or (e)''.

(c) EFFECTIVE DATE.--The amendments made by this section shall apply to refunds payable under section 6402 of the Internal Revenue Code of 1986 after the date of the enactment of this Act.

○

ISBN 0-16-053788-6